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November 17, 2000

Order to Stay Certification of Election Results

Supreme Court of Florida

FRIDAY, NOVEMBER 17, 2000

CASE NOS.: SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY
CANVASSING BOARD

vs. KATHERINE HARRIS, ETC.,
ET AL.

VOLUSIA COUNTY
CANVASSING BOARD

vs. MICHAEL MCDERMOTT, ET AL.

FLORIDA DEMOCRATIC PARTY vs. MICHAEL MCDERMOTT, ET AL.

Petitioners/Appellants

Respondents/Appellees

STAY ORDER

In order to maintain the status quo, the Court, on its own motion, enjoins the Respondent, Secretary of State and Respondent, the Elections Canvassing Commission from certifying the results of the November 7, 2000, presidential election, until further order of this Court. It is NOT the intent of this Order to stop the counting and conveying to the Secretary of State the results of absentee ballots or any other ballots.

WELLS, C.J., SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE,
JJ., concur.

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Test:

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Served:

DENISE D. DYTRYCH
BRUCE ROGOW

Case Nos. SC00-2346, SC00-2348 & SC00-2349

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Supreme Court of Florida

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QUESTION PRESENTED

Whether the Secretary of State and the Elections Canvassing Commission must await the conclusion of manual recounts now underway and include the results of those recounts in the “official results” that they use to “certify the returns of the elections and determine and declare who has been elected” consistent with the requirements of Florida law, including Section 102.111, 102.121 and 103.011 Fla. Stat. (2000).

STATEMENT OF THE CASE AND OF THE FACTS

The eyes of the Nation - indeed, of the entire world - are on Florida. The outcome of Florida’s Presidential election will determine who becomes the next President of the United States. For that reason, it is (if possible) even more essential than in “normal elections” that the voters of Florida, and all of the citizens of our country, have great confidence that the individual declared the winner of the election here actually was the choice of Florida’s voters.

This election is unprecedented, the closest in our Nation’s history. It therefore is not surprising that the provisions of Florida law, designed to ensure that close elections are decided properly and accurately, are being employed. Manual recounts are an essential part of the law of Florida (as in many other states). They have been applied on numerous occasions in elections for lower-level offices. The law of Florida (and of other states) providing for manual

recounts reflects the sound legislative judgment that manual recounts are the most accurate method of objectively determining voter intent. The application of the provisions of Florida law to an election of this scale, with over six million votes cast, has given rise to issues over the meaning of Florida law and of an election system that was designed with local contests in mind.

Instead of seeking to facilitate the resolution of these inevitable issues, the Secretary of State has chosen repeatedly - in at least five different ways - to try to stop or delay the lawful manual recount of ballots. These efforts have included:

- issuance of an opinion on November 13 that manual recounts are illegal except in the event of a machine break-down;

- issuance of a statement on November 13 that no recounts submitted after 5:00 p.m. on November 14, would be considered;

- a November 13 directive issued to four county canvassing boards requiring that they submit by 2:00 p.m. on November 15 their reasons for needing to amend their election results;

- a November 14 response letters rejecting the requests of Broward, Miami-Dade and Palm Beach Counties to amend their election returns;

the petition to this Court filed on November 15 (and denied by this Court that same day) seeking, among other things, an order stopping the manual recounts; and

a November 15 meeting of the Elections Canvassing Commission (“ECC”) in violation of Florida’s Governance in the Sunshine law, Section 286.011, Fla. Stat. (2000), in which the ECC arbitrarily refused to consider any results of manual counting filed after 5:00 p.m. November 13.

Each of these actions was legally unjustified.

In addition, on November 10, the Bush/Cheney campaign filed an action in the United States District Court for the Southern District of Florida to enjoin the manual recounts. The court denied the motion for a preliminary injunction on November 13 *Siegel v. LePore*, 2000 U.S. Dist LEXIS 16333 (S.D. Fla. Nov. 13, 2000) and the United States Court of Appeals for the Eleventh Circuit also denied preliminary relief (Case. No. 00-9009-CIV-Middlebrooks, Affirmed Nov. 17, 2000).

All of these efforts have caused considerable confusion and resulted in significant delays in the manual recount process.

STATUTORY BACKGROUND

The Florida Constitution provides: “All Elections by the people shall be by direct and secret vote” and that all general elections “shall be determined by a plurality of the votes cast” (Art. VI, Section 1) (emphasis added). We ask nothing more, and the Constitution requires nothing less.

The State Elections Canvassing Commission is ultimately responsible for issuing a certificate of election for each office. By law, the Commission is required to include in that certificate “the *total* number of *votes cast* for persons for said office.” Section 102.121, Fla. Stat. (2000) (emphasis added). The Commission bases its certificate on the votes certified by the counties as having been cast, either in an initial report or a corrected, supplemental or amended report submitted following proper completion of any recount deemed appropriate by the county canvassing board in discharging its duties pursuant to Sections 102.141 and 102.166, Fla. Stat. (2000).

The only deadline is the one provided for county canvassing boards to submit their first returns as they exist as of the 5:00 p.m. deadline one week following the election. Sections 102.111 and 102.112, Fla. Stat. Neither the older statute (Section 102.111) nor the more recently adopted one (Section 102.112) imposes any deadline for the submission of corrected, amended or supplemental returns deemed necessary by the county canvassing board to

ensure that the return submitted accurately and completely reflects the votes counted initially and in any recount. The statutes impose no deadline on either the Secretary or the Commission except that the identity of electors be disclosed prior to the December 18 date set by Congress. Section 103.061, Fla. Stat. By law, the Elections Canvassing Commission certificate must include the total number of votes cast for each candidate. Section 102.121, Fla. Stat. By law, the Department of State must certify as elected the presidential electors of the candidates for president and vice president who receive the highest number of votes.

The statutory provisions at issue, all of which must be interpreted in light of the Constitutional mandate, include Sections 102.111, 102.112, 102.121, 102.166, 102.168, 102.169 and 103.011. Section 102.112 requires the county canvassing board to file the county returns for the election of a federal officer with the Department of State “immediately after certification of the election results.” Section 102.112(1), Fla. Stat. (2000). The statute establishes a deadline of seven days from the day following the election for filing returns, and allows that such returns “may be ignored and the results on file at that time may be certified by the department” if the returns are not received by the specified time. *Id.* To enforce compliance, the statute authorizes the department to fine each board member \$200 for each day such

returns are late. Section 102.112(2), Fla. Stat. (2000). Section 102.112(3) allows those fines to be appealed to the Florida Elections Commission.

Section 102.111 contains another provision directing the county canvassing board to forward results of the election to the Department of State “[i]mmediately after certification.” Section 102.111(1), Fla. Stat. (2000). The statute goes on to establish a three-person Elections Canvassing Commission, which is directed to “certify the returns of the election and determine and declare who has been elected for each office” “as soon as the official results are compiled from all counties.” *Id.* The provision, which was adopted prior to Section 102.112, directs that, in the event that the county returns are not received by the 5 p.m. on the seventh day from the day after the election, “all missing counties shall be ignored, and the results shown by the returns on file shall be certified.” *Id.*

In the event that “any returns shall appear to be irregular or false so that the Elections Canvassing Commission is unable to determine the true vote for any office . . . the Commission shall so certify and shall not include the returns in its determination, canvass and declaration. The Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns.” Section 102.112(2), Fla. Stat. (2000).

Section 102.166 provides any candidate or political party the right to “file a written request with the county canvassing board for a manual recount.” Section 102.166(4)(a), Fla. Stat. (2000). The statute goes on to authorize the county canvassing board to authorize a manual recount. Section 102.166(4)(c), Fla. Stat. (2000). “The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate.” *Id.*

In the event that the partial manual recount “indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall

- (a) Correct the error and recount the remaining precincts with the vote tabulation system;
- (b) Request the Department of State to verify the tabulation software; or
- (c) Manually recount all ballots.”

Section 102.166(5), Fla. Stat. (2000). If the officials conducting the manual recount are “unable to determine a voter’s intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter’s intent.” Section 102.166(6), Fla. Stat. (2000).

Section 102.168, Fla. Stat. (2000), provides a separate procedure to contest an election after certification. There, the certification of election of President of the United States “may be contested in the circuit court by any

unsuccessful candidate for such office,” or by any elector or taxpayer.

Section 102.168(1). Such a contest can be initiated by filing a complaint with the circuit court “within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following [sic] a protest pursuant to s. 102.166(1), whichever occurs later.” Section 102.168(2) Fla. Stat. (2000). The complaint must set forth the grounds for such a contest. Permitted grounds include:

“Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.”

Section 102.168(3)(e). The statutory scheme also recognizes that these remedies might not be adequate in all situations. Section 102.169, Fla. Stat., makes clear: “Nothing in this code shall be construed to abrogate or abridge any remedy that may now exist by quo warranto, but in such case the proceeding prescribed in s. 102.168 shall be an alternative or cumulative remedy.”

FACTUAL BACKGROUND

On November 7, 2000, the State of Florida conducted a general election for the President of the United States. On November 8, 2000, the Division of

Elections for the State of Florida reported that Governor Bush, the candidate for the Republican Party, received 2,909,135 votes and that Vice President Albert Gore, Jr., the candidate for the Democratic Party, received 2,907,351 votes. Candidates other than the Republican and Democratic candidates received 139,616 votes.

The difference of 1,784 votes between the Republican and Democratic candidates triggered the automatic recount provisions of Section 102.141(4), Fla. Stat. (2000) (requiring a recount by county canvassing boards if there is a difference of less than .5%). The automatic recount by the county canvassing boards resulted in a difference of 300 votes.

On November 9, 2000, the Florida Democratic Executive Committee requested manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia Counties.

On November 10, the Bush/Cheney campaign brought an action in the United States District Court for the Southern District of Florida seeking to enjoin Broward, Miami-Dade, Palm Beach and Volusia counties from manually counting ballots. The Court denied the motion for a preliminary injunction on November 13 *Siegel v. LePore*, 2000 U.S. Dist LEXIS 16333 (S.D. Fla. Nov. 13, 2000), and the Bush/Cheney campaign appealed on an emergency basis to the United States Court of Appeals for the Eleventh

Circuit. On November 17, the U.S. Court of Appeals for the Eleventh Circuit similarly denied the request for injunction. (Case. No. 00-9009-CIV-Middlebrooks, Affirmed Nov. 17, 2000)

Because of the preemptive statement by the Secretary of State issued on November 13, stating that she would strictly enforce the November 14 deadline for Counties submitting their votes (See App. 5; Ex. A), the Canvassing Board of Volusia County filed a complaint in the Circuit Court of Leon County seeking a declaratory judgment ordering that the Board certify the results of the Presidential Election after the 5:00 p.m. November 14 deadline, and a restraining order preventing the Secretary of State from ignoring results certified by the Board after the deadline. (See App. 1 and 2). Vice President Gore intervened in the action (See Appendix 3).

The Circuit Court very promptly held a hearing to consider the request of Volusia County for a temporary restraining order (See App. 4). But, in the course of that hearing, the Secretary revealed that she had just issued two new opinions. One opinion was issued to the Palm Beach County Canvassing Board (App. 5; Ex. B); it stated that the undertaking by the Board of a manual ballot recount would not excuse them from transmitting election results to the Secretary by 5:00 p.m. on November 14. The other opinion, issued to the Chairman of the Florida Republican Party (App. 5; Ex. C), asserted that the

undertaking of manual recounts is only appropriate in cases where a voter tabulation system fails to count properly marked ballots.

On November 14, 2000, the Circuit Court entered its order Granting in Part and Denying in Part Plaintiffs' Motion for Temporary Injunction (the "Injunction"). (App. 5, Ex. B) In analyzing the actions taken by the Secretary of State, the Circuit Court "Ordered and Adjudged that the Secretary of State is directed to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion." Order at 8. The Circuit Court ruled that "[t]here is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of State, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored." Injunction at 7. The Circuit Court emphasized that "the Secretary cannot decide ahead of time what late returns should or should not be ignored." Injunction at 7.

On November 14, 2000, L. Clayton Roberts, Director of Division of Elections issued a Memorandum to the Supervisors of Election of Broward, Miami-Dade and Palm Beach County (the "Secretary's Opinion") stating that:

“the Secretary requires that you forward to her by 2 p.m. Wednesday, November 15, 2000 a written statement of the facts and circumstances that cause you to believe that a change should be made to what otherwise would be the final certification of the statewide vote, composed of the tallies received by 5 p.m. today, plus the total of the votes received by the counties by midnight on Friday. (App. 5; Ex. E)

Each of Broward, Miami-Dade and Palm Beach Counties fully complied with the Secretary’s directive and filed letters with the Secretary explaining the facts and circumstances supporting their request to amend their election results. (App. 5; Ex. G)

Also on November 14, the Attorney General issued an opinion which squarely disagreed with the legal analysis and conclusion of the Secretary’s November 13 advisory construing the definition of voting tabulation error. (App. 5; Ex. D)

On November 15, 2000, at approximately 9:00 p.m., just seven hours after receiving the counties’ submissions, the Secretary of State released copies of her letters to the counties denying their request to amend their election returns (App. 5; Ex. H) and held a press conference to announce that she would not accept the results of any manual recount results completed after the original Tuesday, November 14 at 5:00 p.m. deadline.

The Secretary's statement was accompanied by an Official Certificate of the State Elections Canvassing Commission purporting to certify the election returns of the general election in Florida as shown by the returns then on file in the office of the Secretary of State from all the counties in Florida. Official Certificate of the State Elections Canvassing Commission (App. 5; Ex. I). The results purported to be certified at that time included the results of the completed manual ballot count in Volusia County.

On November 15, two significant court actions were commenced. The Secretary of State filed her Emergency Petition for Extraordinary Relief in this Court (App. 5 Ex. F), and Palm Beach County filed its original petition in this Court to determine whether the opinion of the Secretary of State or the opinion of the Attorney General was binding (Case No. SC-00-2346). *Palm Beach County Canvassing Board v. Harris and Butterworth*, 2000 Fla. LEXIS 2242 (Fla. S. Ct., Nov. 15, 2000).

Because of the actions taken by the Secretary of State, on November 16, an Emergency Motion to Compel Compliance with and Enforcement of Injunction was filed by the Democratic Party of Florida and Vice President Gore to enforce the November 14 Order of the Leon County Circuit Court (App. 5).

The Delay and Uncertainty Caused by the Secretary of State's Actions and Lawsuits Filed by the Bush Campaign to Enjoin Manual Recounts

The Secretary's unlawful opinion letters created tremendous uncertainty with respect to manual recounts.

Section 102.166(5), provides: "If the manual recount indicates an error in the vote tabulation that could affect the outcome of the election, the county canvassing board shall:

- (a) Correct the error and recount the remaining precincts with the vote tabulation system;
- (b) Request the department of State to verify the tabulation software; or
- (c) Manually recount all ballots." Section 102.166(5), Fla. Stat. (2000)).

On its face, the statute does not include any words of limitation - it provides a remedy for any type of mistake made in tabulating ballots. That plain reading comports with common sense and Article VI Section 1 of the Florida Constitution. An accurate vote count is one of the essential foundations of democracy; it ensures that the peoples' expressed views are properly reflected in the outcome of elections.

This interpretation of the statute is also compelled by the provision of Florida law governing manual recounts, which states that it is the duty of a Canvassing Board and its counting teams "to determine the voter's intent" in

casting the ballot. Section 102.166(7)(b), Fla. Stat. (2000). The statute provides: “If a counting team is unable to determine a voter’s intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter’s intent.”

As this Court has long recognized, the Board must examine each ballot for all evidence of the voter’s intent and make its determination based on the totality of the circumstances. See *Darby v. State*, 73 Fla. 922, 75 So. 411 (1917). This is consistent with the principle, well-established throughout the states, that if a voter has marked a ballot in a manner that cannot be read by a machine, but the voter’s intent can be discerned from the ballot, that ballot must be counted. *Delahunt v. Johnston*, 423 Mass. 731, 733-34, 671 N.E.2d 141, 1243 (1996) (the mere “presence of a discernible impression made by a stylus” is “a clear indication of a voter’s intent” even if the chad remains entirely in place on the punchcard); *Pullen v. Mulligan*, 138 Ill.2d 21, 80, 561 N.E.2d 585, 611 (1990); *Hickey v. Alaska*, 588 P.2d. 273, 274 (Alaska 1978).

Since the statute requires canvassing boards to count these ballots, manual recounts must be available under Section 102.166(5)(c) to allow such ballots to be counted. As the United States District Court observed,

One of the main rationales behind a manual recount system is to observe whether an imprecise perforation, called a “hanging chad,” exists on the physical ballot. If the blunt-tipped voting

stylus strikes the ballot imperfectly, the chad, the rectangular perforation designed to be removed from a punch card when punched, can remain appended to the ballot (although it is pushed out), and an automated tabulation will record a blank vote.

Siegel v. Lepore, Case No. 00-9009-Civ-Middlebrooks, Order on Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction (U.S. D. Ct., S.D., Fla, November 13, 2000), at p. 15 n. 9.

The Secretary of State contended that Section 102.166(5) has a much narrower scope. The Secretary of State's opinion letters provided no justification for her constricted interpretation of the statute. Nor could she. There simply is no precedent or support for her approach. Indeed, prior applications of the manual recount provisions of Florida law have not artificially limited the terms "error in the vote tabulation" to machine breakdowns.

First, the language of Section 102.166(5) provides no justification for narrowing the reach of the provision. The Secretary argued (Resp. 20-21) that the term "tabulation" is inherently limited to the use of electronic or electro-mechanical equipment to count votes. But the dictionary definition of the word has no such limitation. The relevant definition of "tabulate," the verb form of "tabulation," is "to count, record or list systematically." *Merriam-Webster's Collegiate Dictionary On-Line*, (2000). In fact, the Secretary's own argument proves the point - when the election laws refer only to tabulation equipment or

program, those words of limitation are included in the statutory language. The absence of those terms from Section 102.166(5) confirms the provision's breadth.

Second, as discussed above, Florida law clearly provides that ballots must be counted even if they are not marked in a manner that may be read by a machine. But the Secretary of State's approach would have invalidated any ballot that was not machine readable, because there would be no recount remedy for such ballots. That is squarely inconsistent with the statutory requirement that such ballots be counted.

Remarkably, the Secretary recognized this inconsistency, but asserted that Section 102.166(5) overruled sub silentio the longstanding principle - reflected in this Court's decisions such as Darby, and in Sections 102.166(7) and 102.168 - that ballots reflecting a voter's intention should be counted even if the ballot was not marked in a way that could be read by machine. There is no basis in the statute or its history for such a revolutionary change in Florida law, a change that would disenfranchise many thousands of Florida voters and is inconsistent with the laws of numerous other States that, as discussed above, apply an intent standard.

Third, the Secretary's opinion would have subjected voters to the very sort of technical requirements that are strongly disfavored under Florida law.

“If two equally reasonable constructions might be found, this Court in the past has chosen the one which enhances the elective process by providing voters with the greater choice in exercising their democratic rights.” *Republican State Executive Com. v. Graham*, 388 So. 2d 556, 558 (Fla. 1980). See also *State of Florida v. Martinez*, 536 So. 2d 1007, 1008 (Fla. 1988) (“the electorate’s effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election”). The Secretary’s construction of the statute was directly inconsistent with this principle.

Finally, in previously defending her delaying actions, the Secretary argued that her opinions were due deference. The argument assumes one of the issues before the court, her authority to issue the opinions. It also misstates the deference doctrine. These advisory letter opinions, reflecting no legal analysis or application of case law, were issued in the midst of litigation to which the Secretary herself is a party. They do not rise to the level of an official opinion of a State Agency entitled to deference. *Nikolits v. Nicosia*, 682 So. 2d 663, 665 (Fla. 4th DCA 1996).

In any event, that deference to agency interpretation is inappropriate in the circumstances of this case. An agency’s construction of a statute is not entitled to deference where the agency has erroneously interpreted a provision of law. *Southeast Volusia Hosp. Dist. V. National Union of Hop. & Health Care*

Employees, 429 So. 2d 1232 (Fla. 5th DCA 1983); *Pensacola Jr. College v. Public Empls. Rels. Comm'n*, 400 So. 2d 59 (Fla. 1st DCA 1981). An agency has no power to declare a statute void or otherwise unenforceable. *Palm Harbor Special Fire Control District v. Kelly*, 516 So. 2d 249 (Fla. 1987). But that is precisely what the Secretary sought to do. Accord, *Florida Democratic Party v. Carroll*, No. 00-19324 CA (07) (Fla. 17th Jud. Cir. Ct. Nov. 15, 2000), slip op. 4 (the Secretary's opinion "departs from the essential requirements of law to such an extent that it would be quashed if subject to certiorari review").

Against this backdrop of opinions, directives and requests for injunctions, the members of the Canvassing Boards of Broward, Miami-Dade, and Palm Beach Volusia Counties tried diligently to determine what, if anything, they were permitted to do:

On November 10, the Broward County Canvassing Board met and voted to undertake a partial manual recount of ballots. Pursuant to section 102.166(4)(d), Fla. Stat. (2000), a sampling of precincts representing just under 1% of all ballots in Broward County, were recounted on November 13. The result of the partial manual recount reflected an increase of four votes for Vice President Gore, and a request was made for a manual recount of all ballots pursuant to section 102.166(5)(c) Fla. Stat. (2000). The Board initially denied the

request in obedience to the Secretary of State's directives. After Judge Lewis' initial opinion, the Board voted to conduct a full manual recount. Although it has been interrupted by a separate legal challenge filed by a Republican activist, who attempted to enjoin the ballot count and who subpoenaed the Canvassing Board to a hearing (which stopped the recount), the Board is continuing to count ballots and expects to complete the count by November 20.

The Miami-Dade County Canvassing Board undertook a manual recount of ballots in a sample consisting of three of its voting precincts, representing 1% of the ballots, pursuant to Section 102.166(4)(d) Fla. Stat. (2000). The recount of those three precincts was completed at 8:00 p.m. on November 14 and resulted in an increase of six votes for Vice President Gore. The Miami-Dade Board tried to amend its election results with the Secretary of State to reflect those votes, but the Secretary flatly rejected them. After receiving rulings from various courts denying injunctions to prevent the manual ballot recount, on November 17, the Canvassing Board voted to undertake a full manual recount.

The Palm Beach County Canvassing Board undertook a manual recount of ballots of four sample precincts pursuant to Section

102.166(4)(d) Fla. Stat. (2000). The recount of sample precincts resulted in a net increase of 19 votes for Vice President Gore. The Board announced that it believed it should do a full recount but believed it could not do so in the face of the Secretary of State's directives. Following the issuance of the conflicting opinions of the Secretary of State and Attorney General, the Palm Beach Board filed its original petition in this Court and ceased counting pending this Court's decision. Following the decision of this Court, the Palm Beach Board resumed the manual recount, and has completed that count in 39 of its precincts, and is diligently continuing that effort.

PROCEEDINGS BELOW

On November 13, the Volusia County Canvassing Board filed its Complaint, in this case. *McDermott, et al. v. Harris*, in the Circuit Court, Second Judicial District (Leon County), together with a Motion for Temporary Restraining Order and Preliminary Injunction. (App. 1 and 2)

On November 13, Vice President Gore filed his Motion To Intervene. (App. 3)

On November 13, the Leon County Circuit Court held a hearing to consider the Motions for Temporary Restraining Order, and on November 14, the Circuit Court entered its Order Granting In Part and Denying In Part Motion

for Temporary Injunction. (App. 5, Ex. B) The Secretary of State noticed an appeal of the order.

On November 16, the Florida Democratic Party and Vice President Gore filed an Emergency Motion to Compel Compliance with and for Enforcement of Injunction, in Leon County Circuit Court (App. 5)

On November 16, the Circuit Court held a hearing to consider the Motion to Compel Compliance, and on November 17, that Court issued its order denying the relief sought. (App. 13) That order was appealed by the Florida Democratic Party and Vice President Gore, and a Suggestion to Certify the Issue to this Court was filed with the First District Court of Appeals. The case was certified to this Court, and this Court then issued its order finding that it had jurisdiction, and setting a briefing schedule and oral argument in this matter.

SUMMARY OF ARGUMENT

The question before this Court is as fundamental as it is straightforward: whether lawfully cast and counted ballots are to be included in a vote total that will resolve an issue of paramount national importance -- the selection of the President of the United States. The Secretary of State is seeking to reject the ballots cast by hundreds (or perhaps even thousands) of citizens of this state, before the tabulation of those votes has even been completed. She is seeking to reject some - but oddly, not all -- votes that have been tabulated through manual recounts, which are a lawful means for correcting errors in vote tallies, and thereby ascertaining the will of the voters. This Court should hold that she cannot do so.

The Secretary of State lacks discretion to selectively reject manual recounts as part of Florida's vote tally. Such a rejection is contrary to the Constitution's mandate that the election "shall be determined by a plurality of the votes cast." See Fla. Const., Art. VI, Sec. 1. It is contrary to the statutory requirement that she determine which candidate for President "receive[d] the highest number of votes." See Section 103.011, Florida Statutes (2000). It is contrary to the scheme of state statutes that authorize manual recounts, and enumerate them as part of the official election returns. It is contrary to the fundamental public policy of this state, as articulated by

this Court, which has held that a “the electorate’s effecting its will through balloting, not the hypertechnical compliance with statutes, is the object of holding an election.” *State of Florida on the Relation of Bill Chappel, Jr. v. Martinez*, 536 So.2d 1007, 1008 (Fla. 1988). It is contrary to a democratic system that rests on elections being determined by the will of the people, not the whim of state officials.

To the extent that her rejection of these ballots rests on her opinion that such manual recounts are available only in cases of machine breakdown, that view is wholly unsupported by statute or case law. This view -- articulated in the midst of litigation, in the heat of a political controversy, and contrary to the practice in this state for more than 150 years -- is not entitled to any deference. The contrasting legal interpretation put forward by the Attorney General of Florida is correct.

Even if the Secretary of State does have discretion to disregard authorized manual recounts in *some* circumstances, her preemptive declaration that she will, in no event, accept manual recounts in this election, was an abuse of that discretion.

It can be in no way a sound exercise of discretion to reject a result that has not yet been proffered: no real balancing can be done when the weight of one side of the scale has yet to be ascertained. The Secretary could not

lawfully exercise discretion before learning the results of the recount.

Moreover, in making her determination, the Secretary of State relied upon the wrong legal standard, and usurped a role delegated under Florida law to the County Canvassing Boards.

Additionally, acceptance of the Secretary of State's rejection of the Counties' request for time to complete their vote tallies would reward her for her own wrongdoing and contribution to any "delays." Her issuance of a deadline, which was rejected by the courts of Florida; her issuance of a legal opinion directing a halt to the manual recounts, which has been rejected by two courts in Florida; asking this Court to stop the manual recounts, which it declined to do; her requirement that counties comply with newly created administrative proceedings, which is under review here, all have delayed the manual recount process. Taken as a whole, her approach has been Kafkaesque: she has tried time and again to direct the counties to stop counting - and then, once these directives have been set aside by the courts, she has sought to reject these votes because of the counties failure in obedience to her directives to complete the counts on a timely basis.

Machine reading of punch card ballots will predictably misread a certain percentage of ballots. In a close election, that percentage will affect the results of an election. The manual recount provisions of Florida law are a necessary

component of making the use of the initial machine reading of punch card ballots comport with Article VI, Section 1 of the Florida Constitution and the Equal Protection and Due Process Clauses of the United States and Florida Constitutions.

Given the Secretary of State's conduct in this matter, and the great public importance to citizens of this state - and indeed, of the nation - in having confidence that the vote totals ultimately certified in Florida reflect the will of the people of Florida, the balance of the equities tips heavily to petitioners' side. This Court should direct the Secretary of State to include the results of the three manual recounts now underway in the certified election returns, or at the very least, it should instruct her not to certify the result until those manual recounts can be completed and properly reviewed.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THESE CASES.

This Court May and Should Exercise Writs Jurisdiction

This court has broad authority under the Florida Constitution to issue all writs necessary and proper to the complete exercise of its jurisdiction. Article V, Section 5, Florida Constitution. See *Monroe Education Assoc. v. Clerk, District Court of Appeal, Third Circuit*, 299 So. 2d 1 (Fla. 1974) (“... certain

cases present extraordinary circumstances involving great public interest where emergencies are involved that require expedition.”;); See also, *Blore v. Fierro*, 636 So. 2d 1329 (Fla. 1994).

Section 3(b)(8) of the Florida Constitution grants this Court original jurisdiction to “issue writs of mandamus and quo warranto to state officers and state agencies,” Fla. Const. Art. 5 Section 3(b)(8). The power to issue a writ to the Secretary of State under section 3(b)(8) is manifest. On at least two occasions this Court has accepted jurisdiction over cases where that was the precise relief sought. See *Thompson v. Graham*, 481 So.2d 1212 (Fla. 1986); *Hoy v. Firestone*, 453 So.2d 814 (Fla. 1984). In fact, *Hoy* arose in the elections context - John Hoy petitioned for a writ ordering the Secretary of State to place him on a ballot.

The Court also has jurisdiction over the petition under section 3(b)(7), under which the Court “[m]ay issue * * * all writs necessary to the complete exercise of its jurisdiction.” See *Florida Senate v. Graham*, 412 So.2d 360 (Fla. 1982); see also Kogan & Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova. L. Rev. 1151, 1261-67 (1994). The Court has jurisdiction to determine the correct interpretation of Section 102.166(5), Florida Statutes, under section 3(b)(7) because the resolution of this issue will

determine whether a writ of mandamus will be appropriate under section 3(b)(8).

For example in *Florida Senate*, which involved a challenge to a time limit the governor imposed on a special apportionment session of the legislature, this Court determined the correct interpretation of Article 3, Section 16(a) of the Florida Constitution because the apportionment dispute would eventually be before the Court. See *Florida Senate*, 412 So.2d at 361. As discussed above, jurisdiction in this Court under section 3(b)(8) is plain, and thus the Court should likewise interpret the legal provision at issue here.

This case is typical of those where this Court routinely asserts jurisdiction. For example, in *Chiles v. Phelps*, 714 So.2d 453 (Fla. 1998), the Court explained that it “historically has taken jurisdiction of writ petitions where one branch of government challenged the validity of actions by members of another branch.” *Id.* at 456 (citations omitted). A dispute between a county government and the state government is likewise an appropriate one for jurisdiction, particularly where time is critical.

The law offers the people of the state and Intervenor no adequate remedy other than relief from this court. The Electoral College meets to vote, one way or the other, December 18, 2000. If local canvassing boards do not continue their manual recounts and conduct them properly, the passage of time,

the size of the task due to the volume of votes, and the time required for other avenues of relief make other options inadequate. Once completed the results must be promptly certified to affect the electoral college vote.

A court contest under section 102.168 will take time. Unless the manual count is conducted there will be no way to craft a remedy before December 18, 2000. The other remedy available, a petition under section 120.569, Florida Statutes (2000) is likewise flawed. It too requires that the votes be properly counted to provide a meaningful remedy. And it also is too time consuming.

Section 102.169, Florida Statutes recognizes that an election contest may not be adequate relief. It provides:

Nothing in this code shall be construed to abrogate or abridge any remedy that may now exist by quo warranto, but in such case the proceeding prescribed in s. 102.168 shall be an alternative or cumulative remedy.

Quo Warranto is one of the forms of relief Petitioners and Intervenors seek. The statute recognizes the relief is appropriate. The Court should exercise its jurisdiction.

Cases cited by Intervenors George Bush in its brief in Case No. SC 00-2346 recite black letter law that is not applicable to this unique situation. *St. Paul Title Insurance Corp v. Davis*, 392 So. 2d 1304 (Fla. 1989) resolved an effort to resurrect “record proper” review after the constitution was amended

to eliminate it. George Bush's reliance upon *Chiles v. Public Employees Relations Commission*, 630 So. 2d 1093 (Fla. 1994) is misplaced because it overlooks appellate court jurisdiction over agencies created by Florida's Administrative Procedure Act.

The Court in *Kinsella v. Florida State Racing Commission*, 20 So. 2d 258 (Fla. 1944) issued a Writ of Mandamus to a commission which, like the Elections Canvassing Board and the Secretary was not a court. It relied in part upon the lack of adequate remedy at law, as the Petitioner and Intervenor do here. *Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998) issued a writ of quo Warranto because an agency was exceeding its statutory authority as Secretary Harris is.

Furthermore the consolidation of the Palm Beach Canvassing Board's original action with the appeals from the Second Judicial Circuit moot the jurisdictional argument. This court's jurisdiction in Case Numbers SC 00-2348 and SC00-2349 is unquestionable. Art. V, Section 3(b)(4); Fla. R. App. Pro. 9.030(a)(2)(B).

II. THE SECRETARY CAN NOT PROPERLY EXERCISE DISCRETION TO REJECT THE RESULTS OF THE ONGOING MANUAL RECOUNTS

Secretary Harris has justified her unlawful attempt to stop the recount of votes in Broward, Miami-Dade and Palm Beach Counties as an exercise of her “official” discretion. She turns for support to the opinion of Judge Lewis, which states that “the Secretary of State may ignore [county returns filed after 5:00 p.m. of November 14, 2000,] but may not do so arbitrarily, rather, only by the proper exercise of discretion after consideration of all appropriate facts and circumstances.” App. 5, Ex. B Order Granting in Part and Denying in Part Motion for Temporary Injunction, Leon County Circuit Court Case No. 00-2700, at 2-3.

The heart of the Secretary’s claim is her current assertion that she has the discretion to reject vote totals determined by a manual recount if the recounted returns are submitted more than seven days after election day - and that she may exercise that asserted discretion virtually without constraint. This position is an astounding one: it would reject ballots that are conceded to have been validly cast, and that were identified in a properly initiated and conducted recount, simply because they reached the Secretary later than a deadline so short as to preclude the completion of the recounts provided for by statute. This conclusion is the more remarkable, of course, because much of the delay that the Secretary now finds objectionable is attributable to the Secretary’s own actions. Such an extraordinary attempt to

disenfranchise Florida voters has no basis in the statute and runs counter to the public policy of this State. It should be rejected.

A. The Secretary Has No Discretion To Reject The Results Of A Manual Recount

At the outset, there is a fundamental defect in the Secretary's position and in the analysis used by Judge Lewis: in the circumstances of this case, the Secretary *has no discretion at all* to refuse to take into account the results of a manual recount. In arguing to the contrary, the Secretary necessarily is contending that she may disregard properly cast votes, or may halt the tabulation of votes, even if ongoing recounts are in the process of demonstrating that valid ballots were not tabulated *and that the wrong candidate is being certified as the winner*. Not surprisingly, this approach is not compelled by the statutory language, is flatly inconsistent with the statutory structure, and is precluded by the fundamental purposes of Florida election law.

1. The Secretary's view that Section 102.111 or Section 102.112, Fla. Stat. (2000), allows her to exclude manually recounted votes - and to permit certification while a manual recount is pending - cannot be reconciled with the basic statutory structure. The law expressly contemplates that the results of a manual recount will trump a machine vote tabulation. See Section

102.166(5)(c), Fla. Stat. (2000) (when sample shows errors, county-wide manual recount may be ordered). The Secretary appears to recognize as much. She does not deny that she must include manually recounted votes that are tabulated *prior* to 5 p.m. of the seventh day following the election; indeed, she certified the results of a manual recount in Volusia County.

Official Certificate of Election Results, App. 5, Ex. I. Instead, her position is that, although manually recounted votes ordinarily are controlling, she has discretion to exclude those votes if they are returned to her office after that time.

This position, however, makes no sense at all. Florida law provides that a request for a manual recount may be filed at any time prior to certification of the election results (Section 102.166(4)(b)); in addition, by providing that a manual recount may be limited to sample precincts before a county-wide manual recount is authorized (Section 102.166(4)(d), 5(c)), the Legislature plainly contemplated that some time might go by before the recount was conducted. Indeed, the Legislature surely knew that, where large counties are concerned, it may be *inevitable* that it will take more than a week for a manual recount to be requested, authorized, and completed. Against this background, it simply cannot be the case that the Legislature provided for full manual recounts to determine the accurate and controlling

vote tally, while allowing the Secretary to certify a winner prior to when the recount could be completed.

Moreover, county canvassing boards order full manual recounts when they find, based on a review of a sample of the county's precincts, "an error in the vote tabulation which could affect the outcome of the election."

Section 102.166(5), Fla. Stat. (2000). It would make no sense for the Legislature to allow the Election Canvassing Commission to certify the winner of an election based upon vote counts found to be potentially erroneous at the very time that corrected vote counts were being produced.

Read together, Sections 102.112 and 102.166 are most naturally understood to dictate that all manually recounted votes be tabulated and that certification be delayed pending the completion of a manual recount that was requested on a timely basis. See *Acosta v. Richter*, 671 So.2d 149, 153-154 (Fla. 1996) (a statute must be interpreted to give effect to all of its clauses "and to accord meaning and harmony to all of its parts"). To instead read Section 102.112 as permitting the Secretary to exclude votes because a manual recount is not final within one week of the election would run afoul of the black-letter rule that a "statute must be read with reference to its manifest intent and spirit and cannot be limited to the literal meaning of a single word.

It must be construed as a whole and interpreted according to the sense in which the words are employed, regard being had to the plain intention of the Legislature.” *Werhan v. State*, 673 So.2d 550, 554 (Fla. App. Dist. 1996). See *Las Olas Tower Co. v. City of Fort Lauderdale*, 724 So.2d 308, 312 (Fla. DCA 1999) (“a literal interpretation need not be given the language used when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity”), *rev. granted*, 761 So.2d 330 (Fla. Mar. 20, 2000). In fact, Sections 102.111 and 102.111 plainly are meant to apply in the ordinary case when a recount is not proceeding; read in context, these provisions appear intended only to penalize unreasonably dilatory county canvassing boards and not to disenfranchise the voters in such jurisdictions. This point is further suggested by Section 102.112(2), which provides that members of County Canvassing Boards may be fined \$200 for each day that returns are late. Although the provision states that the Elections Canvassing Commission “shall” fine members, it cannot plausibly be suggested that fines are appropriate when certification is delayed for reasons beyond the members’ control - for example, during the pendency of a statutorily mandated recount. Indeed, even when a recount is not pending these provisions do not preclude the late submission of ballots; this Court has held that “we do not find that section 102.111’s ‘all missing counties’

language turns the certification process into ‘an imperative, ministerial duty, ‘involving no judgment on the part of the state canvassing commission.’”

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So.2d 1007, 1008 (Fla. 1988).

Other provisions of the statute confirm that the Secretary’s approach is illegal. The statutory provision dealing with certification of elections states that the Elections Canvassing Commission is to certify the returns “as soon as the *official results* are compiled.” Section 102.111, Fla. Stat. (2000) (emphasis added). And by statute, the “official return of the election” - the only other use of the word “official” in the election law - includes “[t]he return printed by the automatic tabulating equipment, *to which has been added the return of* write-in, absentee, and *manually counted votes.*” Section 101.5614(8) (2000), Fla. Stat. (emphasis added). It therefore is clear that the “official” results that are used in certifying the election include manually counted votes - making it improper to exclude such votes and certify the election before the manual recount is completed.

2. In addition, the Secretary’s position is shockingly inconsistent with “the public policy of Florida” (*Bayne v. Glisson*, 300 So. 2d 79, 82 (Fla. App. 1974)) and the essential purpose of the State’s election laws: effectuating the will of the electorate. This Court has held repeatedly that,

“[b]y refusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.” *Boardman v. Esteve*, 323 So.2d 259, 263 (Fla. 1976). This means that

the electorate’s effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election. “There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain that the statute has not been literally and absolutely complied with?”

Chappell, 536 So.2d at 1008-1009 (citation omitted).

Given the force of this principle, it is not surprising that this and other Florida courts have held time and again that even the literal terms of a statute must yield when necessary to effectuate the electorate’s will. See, e.g., *Boardman*, 323 So.2d at 266 (“What is important . . . is . . . that the will of the people was affected.”).

Of course, that conclusion necessarily applies *a fortiori* in this case where, as we explain above, the various provisions of law, when read together, do not allow the exclusion of manually recounted votes. Yet against this basic policy, the Secretary evidently asserts that the convenience of a quick certification may justify ignoring lawfully cast votes that are being

identified in the manual recount. With respect, we submit that the Secretary's position reflects a manifest disregard for the public policy of Florida.

3. The Secretary also cannot justify her approach by asserting that the exclusion of recounted votes somehow is immaterial because a voter or candidate may attempt to challenge a certified result after the fact pursuant to the contest procedure in Section 102.168, Fla. Stat. (2000). By definition, votes that are added in a manual recount are validly cast votes that should have been counted in the first place. Yet the statutory contest procedure places a substantial burden on voters or candidates who want those votes to count: they must initiate suit and pay a filing fee, and also face the possibility of delay while the other candidate claims to be the victor. Because all valid votes are of equal value, it would be patently unfair, wholly without a statutory basis, and inconsistent with public policy to place candidates (or voters supporting candidates) at a special disadvantage when they are supported by wrongfully disregarded votes that were identified in a manual recount.

Section 102.168 highlights the error in the Secretary's approach. That provision states that a certification by the Election Canvassing Commission may be set aside on the basis of "rejection of a number of legal votes

sufficient to change or place in doubt the result of the election.” Section 102.168(3)(c), Fla. Stat. (2000). Especially given the standard for initiating a manual recount (“an error in the vote tabulation which could affect the outcome of the election” (section 102.166(5), Fla. Stat. (2000)), that any certification that fails to take into account the results of an ongoing manual recount could be set aside immediately under this standard. The Legislature could not have intended to create a situation in which an election certification was almost certainly invalid; the only logical conclusion is that the Secretary and the Elections Canvassing Commission are barred from certifying at all prior to completion of the manual recount.

Any potential for undue delay in completing recounts, of course, is discouraged directly through the availability of fines on dilatory county canvassing board members pursuant to Section 102.112, Fla. Stat. (2000). And in extreme cases, mandamus proceedings would be available to compel action by a recalcitrant canvassing board. In this setting, it surely could only be in the most extraordinary case, if at all, that the Secretary could punish a canvassing board’s lackadaisical behavior by disenfranchising its county’s citizens. This case, of course, could not possibly call for such treatment. There has in fact been no unreasonable delay on the part of the county canvassing boards here; to the contrary, as we explain above, the delay in the

completion of the recounts in this case is almost entirely attributable to the Secretary's own energetic attempts to obstruct and interfere with a manual recount process mandated by law.

B. If The Secretary Does Have Discretion To Reject Manual Recounts In Appropriate Circumstances, She Abused That Discretion Here

For the reasons explained above, the Secretary in no circumstances has discretion to reject the results of a manual recount. Even if we are wrong in that conclusion, however, the Secretary did not properly exercise her discretion in this case. *First*, whatever the nature of the constraints on her discretion, she could not exercise that discretion properly prior to the completion of the recounts. *Second*, it is plain as a matter of law that the Secretary in fact applied an improper legal standard in exercising her discretion. And *third*, on this record and under the proper standard, any decision to disregard the recount would be an abuse of discretion. For all of these reasons, the Secretary's decision cannot stand.

1. ***The Secretary Abused Her Discretion By Deciding To Ignore The Results Of The Manual Recounts Even Before She Received Them***
Whatever the precise contours of the Secretary's asserted discretion to disregard late-filed election returns, she clearly abused it when she decided to ignore the results of manual recounts *before they even were completed*.

As even the Circuit Court recognized, “the exercise of discretion, by its nature, contemplates a decision based upon a weighing and consideration of *all attendant facts and circumstances*.” Slip Op. at 6 (emphasis added). Indeed, under Florida law, “making a premature decision based on an insufficient study of the relevant factors” constitutes an abuse of discretion. *Pasco County v. Franzel*, 569 So. 2d 877, 879 (Fla. App. 1990).

Without knowing the result of the manual recount, the Secretary prematurely announced in advance that the recounted votes submitted by the county canvassing board could not satisfy what she believed to be the controlling criteria. But even under the standards that the Secretary herself identified, she could not properly make that determination on the existing record. In the Secretary’s view, a waiver of the statutory deadline is *inappropriate* “[w]here there is nothing ‘more than a mere possibility that the outcome of the election would have been effected [*sic*].’” App. 5, Ex. H (citation omitted). It naturally follows from this conclusion that a waiver must be *appropriate* when there is a probability (or certainty) that the results of the manual recount *would* affect the outcome. Indeed, it could hardly be otherwise. Section 102.168 - which, as we explain below, the Secretary improperly uses as the basis for her standard - expressly provides that even a certified election must be set aside when enough legally cast votes were

improperly excluded from the tabulation “to change or place in doubt the outcome of the election.” Section 102.168(3)(c). It therefore must be the case that the Secretary abuses her discretion when she excludes properly cast ballots that could have changed the result.

The Secretary will not be in a position to determine whether the recounted votes satisfy that standard until those votes are tabulated and returned.

At bottom, the underlying flaw in the Secretary’s approach may be that she is confusing her role with that of the county canvassing boards. Although the Secretary’s letters anticipatorily rejecting the manual recounts do not quite say this expressly, the criteria she applies suggests that her real contention is that the county canvassing boards should not have initiated manual recounts in the first place. But as we explain elsewhere in this brief, Section 102.166 commits that determination, in the first instance, to the discretion of the county canvassing boards; the Secretary has no role to play in that process.

2. The Secretary Plainly Employed The Wrong Legal Standard In Exercising Her Discretion

Even if the Secretary is correct that she has discretion - and she does not - she committed reversible error by employing the wrong legal standards

in making her decision. The Secretary was again explicit in articulating the source of the criteria that she applied: “I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election.” App. 5, Ex. H. Thus, expressly drawing upon and citing the case law governing election *challenges*, the Secretary explained that manual recounts will be allowed only where there is a showing of fraud, substantial noncompliance with election procedures coupled with reasonable doubt as to whether the certified results expressed the will of the voters, or an act of God that prevented the counties from complying with the statutory deadlines. Id.

As the Secretary freely admitted, she derived the legal standards controlling her exercise of discretion from the case law addressing the question “whether or not to uphold a challenged election.” For this reason, the cases cited by the Secretary were decided under Section 102.168, Fla. Stat. (2000), which governs the “[c]ontest of election[s].” As the Secretary explained, those cases have articulated a stringent test: in the interest of finality, the courts are not to set aside a final and certified election pursuant to a post-certification statutory contest unless it appears clear that there is a

reasonable probability that the outcome of the election did not express the will of the people. See, e.g., *Beckstrom v. Volusia County Canvassing Bd.*, 707 So.2d 720 (Fla. 1998).

These decisions, however, are concerned with the power of the *courts* to overturn a final election pursuant to Section 102.168. They have absolutely nothing to do with the power of an *election official*, during the course of the statutory election certification process, to refuse under Section 102.112 to accept a manual recount conducted pursuant to Section 102.166. The solid policy rationale underlying the strict standard governing Section 102.168 - that elections should be decided by the people, not the courts, and therefore that the courts should refuse to set aside a final election absent a clear indication that the will of the people was not done - is immaterial in this context. Instead, the very different question confronting the Secretary was which tabulation, the manual or the machine count, should be used in determining the will of the people. There is absolutely no reason to import the Section 168 test to govern the Secretary's discretion in this instance.

Moreover, in the context of a Section 112 decision whether to accept a manual recount conducted pursuant to Section 166, a county canvassing board must necessarily base its decision whether to conduct a full manual recount on the incomplete information that extrapolation from a partial

recount can provide. By contrast, in the context of a Section 168 contest, a court considers a challenge to election results based on a full recount. Given the more complete evidence available to the court in the Section 168 context, it is reasonable that the Legislature would have established a more stringent standard for determining whether to go forward with the challenge.

What is more, by providing for manual recounts in close elections, Florida law (like Texas law, see Tex. Elec. Code Section 212.005(d) (“[a] manual recount shall be conducted in preference to an electronic recount”)), expresses a preference for manual counts over machine counts. Such manual counts are presumptively more accurate. Thus, it would be contrary to Florida law to limit the use of the preferred means of counting to only the circumstances governing a Section 168 challenge.

For these reasons, the Secretary erred in employing the stringent Section 168 test in exercising her discretion. It is, by definition, an abuse of discretion for a decisionmaker to employ the wrong legal standard in exercising her discretionary authority. See, *e.g.*, *Bayonet Point Regional Med. Ctr. v. Department of Health & Rehabilitative Servs.*, 516 So.2d 995 (Fla. DCA 1987) (agency abused discretion in making decision based on misunderstanding of the governing rules); *Kremer v. Kremer*, 595 So.2d 214, 218 (Fla. DCA 1992) (“We must take care to avoid a mechanical application

of the abuse of discretion test to shrink from reviewing the incorrect application of clear legal standards or *the application of the wrong standard* To do so is to have the rule absorb the whole of judicial review - to have the branch assimilate the tree.”) (emphasis added; internal quotation marks omitted). Accordingly, for this reason alone the Secretary’s decision cannot stand.

3. *Applying The Proper Legal Standard, The Secretary’s Refusal To Accept The Recounts Was An Abuse Of Discretion As A Matter Of Law*

Because the Secretary applied the wrong legal standard, she paid no real attention to the record in this case; she essentially confined herself to asking whether the county canvassing boards had justified their request for late filing by pointing either to fraud, to a statutory violation, or to a hurricane. Viewed under the proper standard, however, the particulars of the record are relevant, and they point to a clear conclusion: it would be an abuse of discretion for the Secretary *not* to accept the recounted vote tabulations as a part of the official returns.

Recounts and the submission of recounted ballots are governed by Section 102.166 rather than Section 102.168, and it is the former provision that accordingly must provide the standards that bear on the exercise of the

Secretary's discretion regarding recounted ballots (assuming, again, that she has any discretion to apply on the subject). Under that provision, it is committed to the county canvassing board's discretion to determine whether to initiate a manual recount, once a written request containing a statement of reasons has been submitted. Section 102.166(4)(b), (c), (d). In cases - like this one - where the board chooses to recount only sample precincts, "[i]f the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board *shall*" take specified steps, which may include "[m]anually recount[ing] all ballots." Section 102.166(5)(c) Fla. Stat. (2000) (emphasis added).

If the Secretary is to exercise discretion regarding the question whether the conduct of this process permits exclusion of manually recounted ballots, the criteria she applies must be derived from the governing statute; this means that she must look to such considerations as whether the reasons propounded for the recount were impermissible ones, or whether the result of the sample recount reasonably supported the conclusion that county-wide errors could have affected the outcome. Here, those considerations conclusively support the conclusion that there were legitimate grounds for the conduct of the manual recounts - meaning that the Secretary had no basis to exclude the recounted vote tabulations.

There has been no suggestion by the Secretary that any relevant consideration would make inclusion of the recounted totals in the official results inappropriate. To the contrary, letters submitted to the Secretary by both Palm Beach and Broward Counties explained that their sample recounts revealed errors that could well affect the outcome of the election. App. 5, Ex. G There is absolutely no reason to doubt the accuracy of these submissions. Indeed, Palm Beach County offered considerable factual support for its belief that errors could have affected the result of the election, including a significant net gain for Vice President Gore in its sample recount and a county-wide total of approximately 10,000 undervotes. Id. On this record, initiation of the manual recounts plainly was appropriate, and there can be no justification for excluding validly cast votes that are identified in the recount. If the Secretary found otherwise, she would abuse her discretion as a matter of law.

One additional point bears mention: to the extent that delay in the completion of manual recounts bears on whether the Secretary has discretion to exclude the recounted totals - and we believe that it does not - exclusion on that basis in this case would be a manifest abuse of discretion. Broward County explained in considerable detail the reasons for its delay in completing the recount, noting, among other things, the enormous voter

turnout, the size of the County, and the large number of ballots. *Id.* And most fundamentally, of course, any delay by any of the Counties is in large part attributable *to the Secretary herself*. There is no need here to recount the Secretary's efforts to delay the recount. But it cannot be the case that a state agency may deny relief by pointing to a disability that the agency itself imposed on the applicant. For the Secretary to prevail in this effort would make her actions not only arbitrary and unlawful, but also positively Kafkaesque. For these reasons, it would be an abuse of discretion for the Secretary to exclude the recounted ballots.

CONCLUSION

We therefore ask this Court to issue an order directing the Secretary and the Elections Canvassing Commission not to declare the winner of the Presidential election until they receive the results of manual recounts now underway and then include those results in the “official results” (Section 102.111).

The starting point in assessing the propriety of this relief is the extraordinary nature of this case. The right to vote is at the core of our democracy and the President is our nation’s head of state. There is an overwhelming interest in ensuring that every vote is counted.

There is a similarly weighty interest in avoiding uncertainty or confusion regarding the identity of our President-elect. It is critical that the Elections Canvassing Commission’s decision be made on the basis of the most accurate vote count possible, in order to eliminate the possibility that the identity of the winner will change - or even be called into question - by the outcome of the manual recounts. Not just within our country, but all around the world, that confusion would likely generate considerable instability that, in turn, would produce irreparable injury.

These injuries could be avoided if the Secretary and the Elections Canvassing Commission simply waited for the results of the manual recounts

and then took those results into account in determining the winner of the Presidential election.

That approach is appropriate for another reason. As discussed above, much of the delay in the manual recount resulted from the repeated efforts of the Secretary of State to stop those efforts. In these circumstances, it is appropriate to ensure that the county canvassing boards will have an appropriate time to finish their work.

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November 19, 2000
Response by George W. Bush

IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY

vs.

**KATHERINE HARRIS, ET
CANVASSING BOARD**

AL.

VOLUSIA COUNTY

vs.

**MICHAEL MCDERMOTT,
CANVASSING BOARD**

ET

AL.

FLORIDA DEMOCRATIC PARTY

vs.

MICHAEL MCDERMOTT,

AL.

ET

FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

**ANSWER BRIEF OF INTERVENOR / RESPONDENT
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STATEMENT OF THE CASE AND FACTS

O n

Tuesday, November 7, 2000, the citizens of Florida cast votes for their electors for the President of the United States. Since that time, the national election results have been on hold while Florida has conducted an automatic statewide recount and while selected counties have embarked upon extended manual recounts that promise to last for weeks.

On Tuesday, November 14, 2000, the Circuit Court (Lewis, J.) issued an order upholding the statutory deadline for counties to submit their certified returns, enjoining defendant Elections Canvassing Commission (“Commission”) from certifying the final results of the November 7, 2000, presidential election, and directing the Secretary of State not to exercise her lawful discretion in determining the status of manual recounts conducted by plaintiff county boards without first considering all the relevant factors. *See* Order Granting in Part and Denying in Part Motion for Temporary Injunction, *McDermott, et al. v. Harris, et al.*, 2000 WL 1693713 (Fla. 2nd Cir. Ct. November 14, 2000) (“11/14/00 Order”).

Later that day, the plaintiff county boards,¹ along with every other county board in the state, certified official election results with the Commission by the statutory deadline of 5:00 p.m. on Tuesday, November 14. That same evening, the Secretary of State announced that, in light of the court's order, she would consider any reasons for extending the deadline offered by plaintiff county boards in written submissions offered by 2:00 p.m. on November 15, 2000. App. 5, Ex. E.² In light of the Secretary of State's action, four counties offered reasons to justify ignoring the deadlines. App. 5, Ex. O. About 7 hours later, after lengthy deliberations, including consultations with her staff, the Secretary of State announced that no extraordinary circumstances justified extending the statutory deadline. App. 5, Ex. H.

The Secretary of State noted that “no express statutory standards” guide her exercise of discretion; to aid in her decision-making, however, she deemed it “appropriate” to use the analysis of the Florida courts in determining whether to overturn an election to determine, in the exercise of her discretion, whether extraordinary circumstances warranted extending the deadline. *See* App. 5, Exh. H., Letter of Katherine Harris, Secretary of State, November 15, 2000 (“11/15/00 Harris

¹ The Volusia County Canvassing Board was initially a plaintiff, but has withdrawn from the case because it finished a manual recount in time to meet the statutory deadline for reporting election results. §102.112, Fla. Stat. The case is therefore moot as to the Volusia Board.

² Reference is made to the Appendix to the Initial Brief filed on behalf of Albert Gore, Jr., and the Florida Democratic Executive Committee.

Letter”).³ Those factors include: 1) whether there was proof of voter fraud that might have affected the outcome of the election; 2) whether there was substantial noncompliance with election procedures that cast doubt on whether the election expressed the will of the voters; 3) whether the election officials have made a good faith effort to comply with the statutory deadline but were prevented from doing so by extenuating circumstances beyond their control such as an Act of God, a power failure, or equipment or mechanical malfunction. *Id.* at 1-2. The Secretary of State also delineated certain factors that she believed, in the exercise of her discretion, did *not* warrant waiver of the statutory deadline. *Id.* at 2. After setting forth the factors that she would consider in guiding her decision-making, and in light of an opinion issued by the Division of Elections addressing the matter, the Secretary proceeded to consider the reasons offered by the counties to justify a waiver. She concluded that none of the justifications offered by the counties was sufficient reason for waiving the statutory deadline.

Disappointed with the Secretary of State’s response, Petitioners⁴ filed an Emergency Motion to Compel Compliance With and For Enforcement of Injunction,

³ Secretary of State Harris responded individually to the Chair of the County Canvassing Board of the four counties that sought a waiver; because each response contained similar reasoning, we cite the letter generically. The Secretary of State did respond, however, to each Board individually, based on the circumstances each presented.

⁴ Throughout this Answer Brief, “Petitioners” refers to Albert Gore, Jr. and the Florida Democratic Party.

at approximately 11:00 a.m., on Thursday, November 16. App. 12. The Circuit Court convened a hearing on the motion for noon on the same day, and issued the decision under review at 10:00 a.m., on Friday, November 17. App. 13.

The Circuit Court denied Petitioners' motion. App. 13. The court held that the Secretary of State had considered all the relevant factors and had not abused her discretion in refusing to waive the statutory deadline. The Circuit Court otherwise held that the Secretary of State had complied with the 11/14/00 Order. *See* Order Emergency Motion, *McDermott, et al. v. Harris, et al.*, 2000 WL 1714590 (Fla. 2d Cir. Ct. November 17, 2000) ("11/17/00 Order").

Several hours later, Petitioners filed a notice of appeal in the District Court of Appeals. That court subsequently certified the case for review by this Court. Late in the afternoon of Friday, November 17, this Court issued an order accepting the case and setting a briefing and argument schedule.⁵ That same day, this Court, *sua sponte*, enjoined the Secretary of State from recertifying the results of the election pending resolution of this case.

SUMMARY OF ARGUMENT

⁵ This Court also consolidated this case with the pending matter entitled, *Palm Beach County Canvassing Bd v. Harris*, No. SC00-2346. On November 16, 2000, Intervenor filed a pleading entitled *Response of Intervenor George W. Bush to Petitioner's Emergency Petition for Extraordinary Writ*, No. SC00-2346, which reflects our position on the matters before the Court in that case.

Two statutes control this case. Section 102.111 of the Florida Statutes provides that the Elections Canvassing Commission “shall ignore[]” late-filed returns, and Section 102.112 provides that the Commission “may ignore” late-filed returns. Petitioners, in contrast, argue that the two statutes together mean that the Commission can never ignore late-filed returns, but must hold the results of a national election indefinitely pending completion of selective manual recounts in individual counties. Even if the Secretary is authorized to excuse county boards’ noncompliance with the deadline in circumstances other than technical violations, she surely is not required to do so where, as here, there is serious noncompliance in circumstances directly contemplated by the legislature.

This appeal challenges the Circuit Court’s refusal to enjoin the Secretary of State and Elections Canvassing Commission from rejecting late-filed supplemental returns from county boards conducting manual recounts, and from entering a final certification of the election’s outcome.

On review of a denial of injunctive relief, this Court must defer to the trial court’s factual basis for determining that the Secretary acted reasonably, though its review of legal questions is *de novo*. *See Operation Rescue v. Women’s Health Center*, 626 So.2d 664 (Fla. 1993), *aff’d in part and rev’d in part on other grounds*, 512 U.S. 753 (1994). Under both the facts and the law, the judgment of the Circuit Court was correct. The laws of Florida, enacted by the legislature long before the

present extraordinary circumstances confronted the State and Nation, anticipated and resolved the way in which election results in this State are determined. Even in close elections, the legislature has plainly *required* county canvassing boards to complete their work, including any recounts, within 7 days of an election and to certify their results to the Elections Canvassing Commission and the Secretary of State within that time. *See* §102.112(1), Fla. Stat. And the law just as plainly *requires* the Commission to certify final election results as soon as is practicable after 7 days from an election, and to ignore returns from county canvassing boards that fail to meet their deadline. *See* §102.111, Fla. Stat.

As we argue below, that statutory structure all but dictated that the Secretary of State conduct herself exactly as she has throughout the course of events since the election. To the extent that the laws of Florida permit her and the Commission to exercise discretion to excuse late-filed returns, *see* Section 102.112(1), the Secretary of State has reasonably exercised that discretion not to permit logistical difficulties in accomplishing a manual recount to excuse a county canvassing board's late filing of returns. The Secretary of State's conduct was reasoned and reasonable, and was perfectly consistent with (indeed, mandated by) the laws of Florida. This Court's own cases therefore require it to defer to the Secretary's judgment.

In these heated circumstances, when so much is at stake for the State and Nation, it is essential for this Court and all public officials to be faithful to the rule of

law. Under the laws of Florida, there is no possible result here but for this Court to affirm.

ARGUMENT

I

THE INJUNCTION PETITIONERS SEEK IS INCONSISTENT WITH THE TEXT, STRUCTURE, AND INTENT OF THE STATUTORY SCHEME.

Petitioners demand that the Secretary be required to accept election returns from manual recounts in 3 of Florida's 67 counties, even though those recounts have not been completed and will not have been submitted until long after both the mandatory deadline of November 14, established by Section 102.112, and the second deadline of November 17, required by federal law exclusively for overseas ballots.⁶ *See* §102.112(1), Fla. Stat. ("The county canvassing board . . . *shall* file the county returns for the election of the federal . . . officer with the Department of State . . . by 5:00 p.m. on the seventh day following the ...general election...."). Neither the Secretary nor this

⁶ The ten-day period for counting overseas ballots is the product of a consent decree between the State of Florida and the United States entered into in 1982 as a result of an action brought against the State for failure to provide adequate time for overseas military personnel to vote as required by federal law. *See* Consent Decree in *United States v. Florida*, No. TCA-80-1055 (N.D. Fla. 1982). The consent decree is incorporated into Florida law by regulation. Rule 1S-2.013(7), Fla. Admin. Code.

Court has the power to extend that November 14 deadline, because it is precisely established by the statute, and there is no allegation that this deadline violates the Florida or United States Constitutions. Petitioners seek to achieve the same result, however, by contending that the Secretary *must* excuse the county board's violation of an explicit state law requirement, even though the statute clearly states that the Secretary "may" refuse to excuse this legal violation. *Id.* ("If the returns are not received by the Department by the time specified, such returns may be ignored and the results on file at that time may be certified by the Department.")

While the Petitioners' argument is sometimes framed as challenging the Secretary's exercise of her discretion under the Election Code, it is, in fact, a direct challenge to the statute itself and a request for the Court to rewrite the law. Simply put, they ask this Court to revise the statute's plain directive that late-filed returns "may be ignored" to read instead that the Secretary "*may not ignore*" late-filed returns if the county board is conducting a manual recount. Petitioners are not coy about seeking a statutory revision to eviscerate the discretion vested by the plain language of the statute. *See, e.g.,* Petr. Br. at 30 ("The Secretary *has no discretion at all* to refuse to take into account the results of a manual recount.") (emphasis in original); *Id.* at 38 ("The Secretary in no circumstances has discretion to reject the results of a manual recount.").

The only reason offered by the three county boards for offering extraordinarily late election returns is that they are conducting a full manual recount, which, like all manual recounts, can only be conducted if there is an error “which could affect the outcome of the election.” §102.166(3)(c), Fla. Stat. But the legislature expressly contemplated manual recounts in close elections and, with full knowledge of their potential logistical difficulties, nevertheless *required* canvassing boards to file their returns within seven days and expressly authorized the Secretary to ignore returns where they violate that mandatory duty. While it will be the rare case where the Secretary can be said to abuse her discretion to ignore late-filed returns -- because the statute does not set forth any factors or standards cabinining that discretion -- she is certainly not required to accept late-filed returns when the legislature has *expressly contemplated* the county board’s proffered justification for tardiness and nonetheless authorized the Secretary to ignore them. Again, the circumstance that Petitioners feature as a reason specifically justifying the manual recounts here – that the result of the election might turn – is the very predicate for conducting *all* manual recounts. Yet it defies common sense to suppose not only that the legislature silently excepted such recounts from the normal statutory deadline, but also (as Petitioners urge) that the legislature expected no deadline at all to apply.

Here, the Florida legislature knew that there would be manual recounts; it knew that they would only be conducted in close elections; and it knew that the principal

reason for missing the seven-day deadline would be these recounts. A manual recount is the only time-consuming method of certifying election returns; thus, compliance with the seven-day deadline is quite simple in all other circumstances (absent extraordinary external conditions, such as an Act of God).

In the face of this, the legislature not only expressly authorized the Secretary to reject these late-filed returns pursuant to her unfettered discretion, but *required* that the Secretary “*shall* fine each [county canvassing] board member \$200 for each day such returns are late, such fines to be paid only from the board members’ personal funds.” §102.112(2), Fla. Stat. (emphasis added). Thus, the legislature did not excuse delay in a canvassing board’s filing of election returns for any reason, even though it expressly contemplated manual recounts and knew the time pressure they would create. Indeed, we submit that it would be an abuse of discretion to accept late-filed returns in these circumstances because the Secretary would be overriding the balance struck by the legislature between finality and the desirability of manual recounts.

Petitioners’ only response is to hypothesize an inherent conflict between conducting manual recounts and meeting the statutory deadline. They thus contend that the legislature simply could not have contemplated ignoring returns in counties which find it impracticable to do a manual recount within seven days. But the statute’s language and structure make clear that this analysis is wrong on two basic levels.

First, the legislature perceived *no conflict* between the requirement to meet the deadline and a county board's desire to conduct a manual recount. The solution is stated by the express language of the statute: "The county canvassing board *shall* appoint as many counting teams of at least two electors as is *necessary* to manually recount the ballots." §102.166(7)(a), Fla. Stat.⁷ If the county board believes that a manual recount is important to ensure an accurate vote count in a closely contested election, it has a statutory duty to appoint enough counting teams to get the job done by the deadline. If a board is unable or unwilling to do so, it should not exercise its unfettered discretion to embark on a manual recount. *See* §102.166(4)(c), Fla. Stat. ("The county canvassing board *may* authorize a manual recount."). If the county decides to embark down this road *and* then violates *both* its statutory duty to file returns within seven days and its duty to appoint enough counting teams to meet the deadline, the legislature certainly did not expect, much less require, the Secretary to ignore this dual violation. While large counties obviously have more votes to count, it is equally obvious that they have more staff, resources, and money to count those votes. There is not a scintilla of evidence that any of the three counties at issue here were *unable* to meet the Tuesday deadline – as Volusia County did. In any event,

⁷ It should be noted, moreover, that a manual recount is only one of three options that county boards can use to correct an perceived error in voter tabulation. *See* § 102.166(5)(a)-(c), Fla. Stat.

there is no basis in law for requiring the Secretary is not required to provide differential treatment to small and large counties.

Second, even if a county board finds it logistically difficult to conduct a timely manual recount, there is still no conflict because the decision whether to conduct the recount at all is entirely discretionary with each county canvassing board. §102.166(4)(a), Fla. Stat. Thus, in stark contrast to the affirmative and uniform duty to submit election returns within seven days, there is no “duty” to conduct a manual recount or any “right” to have one. That being so, the Florida legislature did not impose conflicting obligations on county boards which the Secretary is obliged to ameliorate. Rather, it simply gave the county boards a conditional option: a manual recount may be conducted but it must be completed within seven days. There is no inconsistency at all between an option to conduct a recount and a duty to file the returns within seven days. It simply means that the discretion to conduct a recount must be exercised in a timely manner. Indeed, Section 102.112 and the manual recount provision of Section 102.166 were enacted simultaneously. Ch. 89-338, 89-348, Laws of Fla. Surely the legislature would not have enacted two conflicting provisions at the same time. The Court’s duty, of course, “is to adopt an interpretation that harmonizes two related statutory provisions while giving effect to both, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force.” *Palm Harbor Special Fire Control v. Kelly*,

516 So.2d 249, 250 (Fla. 1987); *See also, State ex rel. Sch. Bd. of Martin County v. Dept. of Educ.*, 317 So.2d 68, 72 (Fla. 1975). Our construction of the statutes, in notable contrast to Petitioners', permits both sections easily to coexist. The Secretary is therefore authorized to reject the returns submitted by a county board that has decided to pursue a recount that it is unwilling to complete rather than to comply with its affirmative statutory duty to do so.

Further evidence that the legislature expected timeliness in submission of returns is found in the requirement that county board members who delay the submission of returns in order to conduct manual recounts must nonetheless be personally fined \$200 per day for every day beyond the deadline. §102.112(2), Fla. Stat. As Petitioners themselves note, it is not remotely "plausibl[e]" that a legislature would fine county board members for conducting manual recounts necessary to assess the "electorate's . . . will." *Chappell v. Martinez*, 536 So. 2d 1007, 1008 (Fla. 1988). Indeed, if the legislature believed that manual recounts beyond the deadline were absolutely necessary to accurately calculate the number of votes cast, it would have been extraordinarily inequitable for the legislature to *punish* board members who are simply carrying out this important constitutional and public duty. Contrary to Petitioners' assertion, however, public policy concerns do not authorize this Court to rewrite a second provision in the statute by amending "shall" be fined to "shall not" be fined. Indeed, the statutory language vividly illustrates that the Florida legislature, unlike the

Petitioners, did not either view manual recounts as essential to accurately determining the vote count or treat the endless pursuit of time-consuming manual recounts as more important than the finality and equal treatment insured by having a uniform deadline.

The essential premise of Petitioners' entire argument (Petr. Br. at 30) is that there is an overriding "public policy" in favor of accurately counting "validly cast" ballots and that the Florida legislature designated manual recounts as *the* methodology for an accurate count. We, of course, fully agree that the will of the people should be done. But it is entirely clear that the Florida legislature did not view manual recounts as a necessary ingredient in determining the will of the people. The legislature did not provide the slightest hint that whatever improved accuracy might be obtained in a manual recount overrides the values of finality and uniformity created by an even-handed deadline. If the Florida legislature had elevated manual recounts to the exalted status Petitioners imagine, it would not have made the use of this methodology wholly discretionary, and it would not have ensured that it would be performed only in *parts* of the State. Rather, it would have compelled this process throughout the State in close elections to ensure the "correct" winner. The legislature's failure to do so, in contrast to the *automatic statewide* machine recount in elections with a .5 percent margin, *see* §102.141(4), Fla. Stat., demonstrates that the legislature does not share Petitioners' devotion to this particular vote methodology.

Similarly, if the legislature believed that counting votes by some method other than a hand count was equivalent to “rejecting ballots that are conceded to have been validly cast” (Petr. Br. at 30), it would not have consigned 63 of Florida’s 67 counties to this onerous fate. But the legislature, unlike Petitioners, understood that manual recounts accept all “validly cast” ballots (and reject all improperly cast ballots) only if they are conducted perfectly. Unless manual recounts are the one human activity uniquely immune from error, stress, and incorrect subjective judgment -- particularly in a highly-charged partisan environment -- then manual recounts will also reject validly cast ballots, or include improper ones. Indeed, by asking the Court to substitute the returns derived from the hand count for those returns already certified by the county boards on Tuesday, it is Petitioners who are seeking to reject the compilation of “ballots” *presumed* by Florida law to be “validly cast.” See §102.155, Fla. Stat.; *Boardman v. Esteve*, 323 So.2d 259, 267 (Fla. 1975). Moreover, there is neither any finding by the legislature, nor a scintilla of evidence in the record, nor any other factual basis, for this Court to conclude that hand recounts are more accurate than the returns certified on Tuesday. If the Florida legislature believed that the “accuracy” of manual recounts was more important than the finality and uniformity created by the mandatory statutory deadline, it would not have imposed a mandatory deadline on *all* counties, including those conducting mandatory recounts, and required personal fines for board members who missed the deadline, including those conducting manual recounts.

Petitioners nonetheless claim that it would be “unthinkable” for the legislature to exalt finality over manual recounts because the deadline is “hypertechnical” and accuracy is more important. But the Florida legislature, like the Framers of the Constitution, understood that finality and uniformity are essential to the orderly administration of a democratic process. That is why Congress, pursuant to explicit constitutional authorization, Article II, Section 1, U. S. Constitution, established a mandatory deadline of December 18 for Florida and other states electors to meet, on pain of excluding *all presidential* votes from the State. *See* 3 U.S.C. §7. It was hardly irrational or unconstitutional for the Florida legislature to impose a deadline precisely analogous to that required by the Constitution itself, as evidenced by the fact that not even Petitioners claim that there is any constitutional impropriety in demanding that manual recounts be performed within the statutory period. This is particularly true since the consequences for non-compliance here are far less severe than those for missing the electoral college deadline. Unlike the electoral college, the counties’ votes will not be excluded; on the contrary, all votes cast in those counties have already been certified and will be part of the official election results, as computed pursuant to the same methodology used in 63 other Florida counties.

Petitioners erroneously equate enforcing a deadline against someone seeking to pursue an activity with “denying” the person the right to engage in that activity. The very right to vote itself is subject to mandatory deadlines. Persons seeking to cast

their vote after 7:00 p.m. in Florida have not been “denied” the right to vote when they are excluded from the polling place. No matter how compelling the reason for the voters’ tardiness, or how diligently he or she sought to meet the deadline, lateness will not be excused, because all voters must abide by the same rules. Similarly, no matter how important the counties believe it is to recount votes, the Secretary has not denied them that opportunity by enforcing the deadline -- the failure to comply is of their own doing.

Moreover, although the injunction they request is entirely open-ended and their brief does not hint at *any* endpoint, we must assume that even Petitioners agree that some deadline at some point is appropriate prior to the Inauguration itself. That being so, they are simply asking the Court to substitute a judicially-created deadline for the date selected by the legislature. But, the judiciary is without authority to do such a thing absent a determination that the legislative judgment violates the Florida Constitution or federal law.

In short, Petitioners seek to turn the process of statutory interpretation on its head. They hypothesize an absolutely overriding “public policy” -- manual recounts are the only way to ensure accurate vote tallies -- contrary to the statute’s language and structure, then invoke this public policy to rewrite any statutory provisions that are contrary to the hypothesized policy. Thus, to implement Petitioners’ desired policy of manual recounts at all costs, the Court is asked to (1) replace the mandatory

statutory deadline and substitute a standardless, undefined endpoint; (2) tell the Secretary that she “may *not*” ignore late-filed manual recount returns; (3) dictate that the Secretary “shall *not*” fine board members for missing a deadline; (4) transfer authority from the Secretary to the canvassing boards for challenging when it is reasonable to miss the statute’s mandatory deadline; and (5) substitute the certification process of Section 102.111 and Section 102.112 for the contested election process of Section 102.168 as the means for determining the accuracy of vote tallies. It is fundamental, however, that the Court discern public policy by examining the statute, and not by overriding the statute’s plain terms.

Moreover, even after the Court has completed the extended journey of revision through the election code that Petitioners urge, we will still not have arrived at the destination which Petitioners claim equity demands: an accurate *statewide* compilation of votes for presidential candidates. If, as Petitioners claim (Petr. Br. 22, 24) (quoting §103.001, Fla. Stat.), machine reading of ballots will “predictably misread” the valid ballots cast, the Court will not know which “candidate for ‘President’ receive[d] the highest number of votes” even *after* the manual recounts in these three counties are completed. There will still be 63 counties which have not conducted a manual recount. And, if Petitioners are correct, it would be intolerable to allow such a close election turn on the “potentially erroneous” results produced by these machine counts. Yet Petitioners, notwithstanding their devotion to manual recounts in all circumstances, did

not request that all Florida counties conduct manual recounts, as was their right under Section 102.116. Nor do they ask this Court to order a statewide recount. That being so, under their own terms, the relief Petitioners seek will *necessarily* would produce an inaccurate tabulation of who received a “plurality of the votes cast.”, Art. VI, §1, Fla. Const. If machine counts are less accurate than hand counts, then they inherently cannot produce an accurate result, since this machine methodology will be used in over 90 percent of Florida’s counties. Conversely, if machine counts are as accurate or more accurate than hand counts, then replacing the machine counts with hand counts will not always improve accuracy.

Indeed, allowing these three counties, and only these three counties, to include manual recounts will inevitably *skew* the results in a partisan manner that favors Democrats. Naturally enough, the counties selected by the Democratic Party for a recount are predominantly Democratic. All else being equal, since the majority of the ballots are cast by Democrats, the predominant number of the disputed ballots included by the hand count will also be Democratic. Thus, Democrats will disproportionately benefit from any alteration of the machine count in those counties.

In a *county* election, no court would permit a recount in only four of 67 precincts, particularly if those precincts were selected by one political party and were composed predominantly of members of one party. It follows *a fortiori* that this

Court may not require such a partisan, skewed recount in the name of “accuracy” particularly in the face of explicit statutory requirements foreclosing such a “remedy.”

Petitioners’ argument, in the end, boils down to the dramatic proposition that a manual recount in selected heavily Democratic counties might affect the outcome of the election, and that the Secretary of State must extend the deadline to ensure that the “will” of the voters is done. This argument is speculative as a matter of fact, and inconsistent with the statute.⁸ The simple point is that the law sets as a predicate for *even undertaking* a full manual recount that “an error in the vote tabulation could affect the outcome of the election.” §102.166(5), Fla. Stat. Because the outcome must *always* be in doubt if a manual recount is proceeding, Petitioners’ case again reduces to the proposition that Section 102.166’s manual recount provisions supersede the rest of the lawful processes for determining the outcome of elections. The statutory provisions involved operate comfortably, however, and are certainly not in the irreconcilable conflict that would be required to find an implied repeal of

⁸ We note, moreover, that each county has officially reported its results to the Secretary, and that the Commission has officially certified the results pending the inclusion of the results of overseas absentee ballots. Thus, the “official return of election” includes all the official results certified, including the results of the manual recount in Volusia County. *See* § 101.5614(8), Fla. Stat. Petitioners claim (Pet’r. Br at 34) that this statute’s reference to the inclusion of the results of the manual recounts means that it is “improper to exclude such votes and certify the election before the manual recount is completed.” That argument is wrong. Indeed, the fact that the Volusia County manual recount is included in the results here belies the notion that there is any tension between both certifying and conducting manual recounts within the statutory time period.

Section 102.112's deadlines by Section 102.166. *See City of St. Petersburg v. Pinellas County Power Co.*, 87 Fla. 315, 319, 100 So. 509, 510 (1924) ("It is familiar law that repeals by implication are disfavored ...An interpretation leading to such a result should not be adopted *unless it be inevitable.*"); *Oldham v. Rooks*, 361 So. 2d 140, 143 (1978). It is plain in these circumstances that no contrary interpretation is "inevitable."

I I .

**THE LAWS OF FLORIDA ANTICIPATED THE PRESENT
CIRCUMSTANCES AND THE SECRETARY OF STATE HAS
FAITHFULLY IMPLEMENTED THE LEGISLATIVE DESIGN
FOR DETERMINING THE RESULTS OF THIS ELECTION.**

A .

**This Court Must Defer to the Secretary's Discretionary Judgment
That Extensions of The Statutory Deadline Are Unwarranted
Because That Judgment Was Consistent With Law and Was Not
Unreasonable or Arbitrary.**

This Court has made clear that the Secretary of State has broad deference in implementing the State's election laws. Only if her legal judgments are clearly contrary to law, and her discretionary judgments irrational and arbitrary, is it permissible for this Court or any other to interfere. This regime of deference is well established, and is an essential component of the separation of powers. *See* Art. II, §3 Fla. Const.

The cases establish that the Secretary's formal determination of the operation of Florida law regarding the timing of reporting election returns is entitled to conclusive deference from this Court unless it can be shown to be a plainly unreasonable reading of the relevant law. In the particular context of elections, this Court has been emphatic about the need for courts to give deference to the constitutional role of the executive in conducting and certifying elections pursuant to state law. As the Court has stated:

The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate.

Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840, 844 (Fla. 1993)(*quoting Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975)). And the Court has further emphasized that:

the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Id.

This Court has recognized that responsible officials have wide discretion in construing statutes that they administer, and that courts are not to overturn their actions unless they are “contrary to the language of the statute” or “clearly erroneous.” *Greyhound Lines, Inc. v. Yarborough*, 275 So.2d 1, 3 (Fla. 1973). *See also, Smith v. Crawford*, 645 So.2d 513, 521 (Fla. 1st DCA 1994); *Donato v. American Tel. & Tel. Co.*, 767 So.2d 1146 (Fla. 2000); *Bellsouth Comm. v. Johnson*, 708 So.2d 594 (Fla. 1998); *Florida Interexchange Carriers Ass’n v. Clark*, 678 So.2d 1267, 1270 (Fla. 1996); *Republic Media, Inc. v. State of Florida Dept. Of Transportation*, 714 So.2d 1203 (Fla. 5th DCA 1998).⁹

Thus this Court has emphasized the presumption that officials have “perform[ed] their duties in a proper and lawful manner,” and that “returns certified by election officials [are] correct.” *Boardman v. Esteva*, 323 So.2d 259, 267 (citing

⁹Other courts have noted that: “Courts cannot willy nilly strike down legislative enactments or acts of executive officers because they do not comport with judicial notions of what is right or politic or advisable.” *State ex rel. Second District Court of Appeal v. Lewis*, 550 So.2d 522, 526 (Fla. 1st DCA 1989), *cited with approval, Comptech International, Inc. v. Miami Commerce Park Ltd.*, 753 So.2d 1219 (Fla. 1999).

City of Miami Beach v. Kaiser, 213 So.2d 449, 453 (Fla. 3d DCA 1958)); *Burke v. Beasley*, 75 So.2d 7 (Fla. 1954). We note as well this Court has “expressly state[d]” that “strict adherence by election officials to the statutorily mandated election procedures” is required. *Beckstrom v. Republican Party of Volusia County*, 707 So. 2d 720, 725 (Fla. 1998).

As we demonstrate above, it is plain that the Secretary’s interpretation of the law here is entirely reasonable. On the most basic point, it cannot be “contrary” to Section 102.112’s language to say that “may ignore” means that county board returns filed after the deadline will sometimes be ignored. Indeed, Petitioners’ construction, which requires a deadline waiver any time there is a manual recount, literally rewrites the Florida code. As noted, conducting a manual recount will be the most common reason for missing the deadline because it is the only process for counting votes that potentially might take more than seven days. If the Secretary *must* treat the three late-filing county boards the same as the Volusia County Board -- which timely performed a manual recount -- then the statute is literally of no legal consequence and the Secretary is obliged to preferentially treat those who fail to meet the lawful deadline. Indeed, under the Petitioners’ theory, it is difficult to conceive of *any* reason that would justify the Secretary in ignoring late-filed returns. She must excuse noncompliance for reasons foreseen by the legislature (such as manual recounting); for reasons unforeseen, and in all cases of substantial compliance. Thus, the deadline is

to be converted into an aspirational goal, to be enforced only against those who willfully defy the statute for *no* reason.

Petitioners cite (Petr Br. at 35) a number of cases for the general proposition that the paramount concern of the State in conducting elections is to do the will of the People, and that legal technicalities should not thwart the voters' clearly-expressed will. This is why, of course, the Commission will excuse filings that are in "substantial compliance," as was the case in *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988). But this is not a case where the late-filed returns, whenever they are completed, will be in substantial compliance with the statutory deadline. The earliest any could be expected is next Monday or Tuesday, seven days after the time they were due, thus *doubling* the statutory time period.

B. Secretary of State Engaged in Reasoned Decision-making By Considering All the Relevant Factors Before Deciding, and Did Not Abuse Her Discretion In Declining to Extend The Clear Statutory Deadline.

1. The Secretary of State Engaged in Reasoned Decisionmaking.

The circumstances show that the Secretary of State engaged in a reasoned process of decisionmaking that went far beyond the requirements of law. Throughout the relevant events, the Secretary of State has taken a number of steps – both before and after the Circuit Court entered the 11/14/00 Order -- to ensure that she fully

complied with the law, as well as with that court's direction, before concluding whether to accept late-filed returns:

First, the Secretary of State informed the county boards by formal opinion of her general approach to considering whether to accept county election returns beyond the statutory deadline for reporting established by Section 102.112. *See* 11/13/00 Opinion Letter. Pursuant to her statutory responsibility to provide advisory opinions as part of her execution of the election laws,¹⁰ the Secretary of State formally opined, at the *request* of the Palm Beach County Canvassing Board chair, that conducting a manual recount of ballots would not ordinarily constitute the sort of extraordinary circumstance that would justify excusing the strict seven-day statutory deadline for reporting elections returns. *See* §§102.112, 102.111, Fla. Stat.

Petitioners are sharply critical (Petr. Br. 13, 18) of the Secretary's issuance of this opinion letter, terming it unlawful and not due any deference because of the circumstances in which it was issued. That contention is surprising, inasmuch as the laws of Florida *require* the Division of Elections to provide advisory opinions upon the request of, among others, county canvassing boards, *See* Section 106.23, and Petitioner Palm Beach County Canvassing Board's chair made such a request. 11/13/00 Opinion. Moreover, the Secretary's conduct reflects responsible administration of the laws in providing as much notice and information as possible to

¹⁰ *See* §106.23, Fla. Stat.

those who are expected to comply with the law. *See, State Dept. of Health and Rehabilitative Servs. v. Framat Realty, Inc.*, 407 So.2d 238, 241 (Fla. 1st DCA 1981); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). It is odd, to say the least, for Petitioners to complain that the Secretary gave them *too* much notice of her understanding of the law and the sorts of factors upon which she would rely in exercising her discretion to extend the deadline. If she had said nothing and certified the election result without the three counties conducting recounts, they predictably would have claimed that the Secretary had engaged in post hoc adjudication without sufficient notice. Finally, the substance of the opinion was plainly correct, and is entitled to deference regardless of the timing with which it was issued. *Smith v. Crawford*, 645 So.2d 513, 521 (Fla. 1st DCA 1994).¹¹

Second, the Secretary of State sought submissions from county boards seeking a deadline waiver so that she would be aware of the particular circumstances of each county's situation. No provision of law required her to seek or accept written

¹¹ Petitioners spend a number of pages arguing (Petr. Br. at 13-18) that the Secretary of State's opinion letter regarding whether the manual recounts were authorized at all was mistaken. Our position on that issue is contained in our prior filing in *Palm Beach County Canvassing Board v. Harris*, No. SC002346. Contrary to the impression Petitioners apparently seek to create, however, that opinion letter is completely irrelevant to whether the Secretary of State acted unlawfully and unreasonably in refusing to waive the deadline for submission of manual recounts. The views expressed in that opinion were not a factor upon which she relied in reaching her judgment; and the results that the Commission in fact certified included the manual recount in Volusia County.

submissions, yet she did so. Petitioners seek, however, to paint this action as a sinister attempt (Petr. Br. at 2) to obstruct and delay the manual recounts. It is a strange proposition that the Secretary acted unlawfully and unreasonably in giving interested parties a complete opportunity to apprise her of the facts. And the Court can be confident that, had she not done so, petitioners would be here arguing that the Secretary unreasonably did not bother to gather the relevant information prior to making her decision.

Third, the Secretary of State provided detailed reasons for why she exercised her discretion not to extend a waiver. Again, no provision of law required such a formal statement of reasons – neither Section 102.112 nor any other statute confines the manner in which she is to make that determination -- yet she provided one.

Fourth, the Secretary of State, recognizing that the statutes of Florida provided little substantive guidance in exercising her discretion over the matter, deemed it appropriate to consider factors like the ones that the courts consider in determining whether an election should be overturned. *See* 11/15/00 Harris Letter at 2. That was entirely reasonable, and again was beyond any legal requirements imposed on the Secretary.

The Secretary of State also considered the factors explicitly mentioned by the Circuit Court as relevant to a determination whether to extend the deadline. *See* 11/15/00 Harris Letter at 2.

Finally, the Secretary of State additionally considered all the reasons offered by the counties for their delay, and responded in a reasoned fashion to those arguments. Nothing more was required.

2. T h e Secretary of State Did Not Abuse Her Discretion In Declining to Waive the Deadline for County Boards Wishing to Complete a Manual Recount.

In addition to engaging in a laborious process of reasoned decisionmaking, the Secretary of State's substantive reasoning for declining to exercise her discretion to waive the deadline was perfectly sound. Again, a valid excuse for a county board to miss the statutory deadline cannot be a circumstance expressly contemplated by the legislature, because the legislature simultaneously provided for manual recounts *and* a mandatory deadline. *See* §§102.166, 102.111, 102.112, Fla. Stat.

The factual circumstances confronting the Secretary of State support the conclusion that she acted reasonably in declining to extend the statutory deadline on the ground that county boards have found it logistically difficult to complete manual recounts in a timely manner. There is *no* evidence that these three boards could not count their ballots in a timely manner with sufficient resources and diligence. We note that the Volusia County Canvassing Board was able to conduct a full manual recount of about 184,000 voters in only three days. *See Fla. County Orders Manual Recount*, AP

Online, Nov. 12, 2000; *At 5 O’Clock, All’s Well as Vote Tally Is Certified*, Miami Herald, Nov. 15, 2000.

Indeed, the following course of events belie any notion that the county boards could make such a case.¹² The Palm Beach County Canvassing Board – the only board still challenging the Secretary’s deadline decision -- decided in the early morning hours of Thursday, November 9 to conduct a partial manual recount of four precincts. *Bush Leads Gore by 229 in Florida*, AP Online (Nov. 9, 2000). The Board then waited until midday Saturday, November 11 – a delay of approximately 60 hours – before beginning even this limited manual count. *Recount Intensifies Palm Beach Drama*, AP Online (Nov. 12, 2000). When this limited recount was completed in the early morning hours of Sunday, November 12, the Board then set a meeting for Monday, November 13, simply to discuss how next to proceed. *Fla. County Orders Manual Recount*, AP Online (Nov. 12, 2000). At that meeting, the Board decided to wait to start the actual recount until Tuesday, November 14. *Gore Joins Suit to Extend Deadline*, AP Online (Nov. 13, 2000).

After this Court issued its November 16 order, the Board finally commenced its county-wide manual recount at 7:00 in the evening. It is expected to complete that

¹² The facts we describe here are not part of the record. In light of Petitioners’ choice to rely upon extra-record factual assertions, without citations of any sources, we concluded that it was appropriate to bring a fuller picture of the facts on the public record (as referenced in media reports) to this Court’s attention. We note that we requested an evidentiary hearing on these issues in the Circuit Court.

recount as early as Tuesday, November 21. *Count Expected to Take Six Days*, Miami Herald (Nov. 17, 2000). Plainly, though, if the Board can conduct a full recount between the afternoon of Thursday, November 16, and Tuesday, November 21, it could have, with little extra diligence, conducted the recount between Thursday, November 9, and the statutory deadline of Tuesday, November 14.

Similarly, the board in Broward County commenced its full recount (after a partial recount of 1% of the precincts) on the afternoon of Wednesday, November 15, and, according to Petitioners, “expects to complete its work by November 20” — this Monday. Petr. Br. at 19. Again, if a full recount can be completed between last Wednesday afternoon and Monday, there is no reason to believe it was not possible to begin on Thursday, November 9, and end on Tuesday, November 14. Yet Broward decided to wait until Monday, November 13 even to begin the 1% partial recount, because a board member went on vacation and Friday, November 10 was a federal holiday. App. 5, Ex. G.

The Miami-Dade County Canvassing Board has engaged in extraordinarily dilatory conduct since the election. That Board did not even meet to consider conducting a full recount until November 14, *the day the returns were due under the statute*. *Latest Developments in the Presidential Recount*, Miami Herald (Nov. 16, 2000). At that meeting, the Board decided not to authorize a full manual recount. *Id.* Finally, on November 17 – three days after the statutory deadline – the Miami-Dade County

Board decided to conduct a full manual recount. *See* Notice of Miami-Dade to the Supreme Court of Florida (filed Nov. 18, 2000); Petr. Br. at 20. The Board then waited another full day to meet to establish procedures, and did not start the recount until Sunday, November 19. *See* Notice of Miami-Dade, *supra*. Election officials have predicted that this recount will take *26 to 30 days to complete*. *Dade Decides to Recount: Process Could Take Weeks*, Miami Herald (Nov. 18, 2000). This means, of course, that Miami-Dade will not be through until approximately the deadline for appointing electors to the electoral college. Since even Petitioners agree that the Secretary may ignore returns from “unreasonably dilatory” boards – and this would include, one would imagine, those boards whose delay could cause the entire State to be disenfranchised from the presidential election – they must concede that the Secretary and the Nation cannot be forced to await the day when, or if, Miami-Dade decides to finish its recount.

In light of these three counties’ conduct, Petitioners’ assertion that “any delay by any of the Counties is in large part attributable *to the Secretary herself*,” is demonstrably untrue. Petr. Br. at 46. Each action of the Secretary that supposedly kept the three counties from completing their manual counts on time took place either on the 13th or the 14th of November. Petr. Br. at 24. But Palm Beach County would not have started its manual recount until November 14, Broward County waited until the evening of November 13 even to decide whether to conduct a full recount (and

then decided not to), and Miami-Dade County similarly waited until November 14 to consider whether to perform a full recount (it too decided against doing so). Thus, excusing the counties' non-compliance with the statutory deadline would only "reward [them] for [their] own wrongdoing and contribution to any 'delays.'" Petr. Br. at 24.

Finally, Petitioners have suggested no standard by which a court – when it does stand in the shoes of the responsible administrator – is to determine when a county board has had enough time for a third recount. If not by the statutory deadline, when is the administrator entitled to say that enough is enough? After an additional week? A month? In fact, Petitioners seem to assert that the importance of manual recounts means that *no* deadline for their completion is lawful.¹³ But again the courts have no basis for disagreeing with the legislature's or Secretary's judgment, based on an "impression by a particular judge or panel of judges" that a different deadline seems more "appropriate." *Krivanek v. Take Back Tampa Political Committee*, 625 So.2d 840, 844 (Fla. 1993)(internal quote and citations removed.)¹⁴

¹³ Petitioners claim (Petr. Br. 43) that manual recounts are preferred to machine recounts in close elections. That is not true, of course, inasmuch as Florida law requires an automatic *machine* recount in elections with a margin of .5 percent or less, *see* § 102.141(4), Fla. Stat.; it *never* requires a manual recount, *see* § 102.166(4), Fla. Stat.; it requires a protester seeking a manual recount to show that a mistake occurred, not merely that the election was close, *see* § 102.166(1), (5), Fla. Stat.; and it sets out a full manual recount as the *last* of three options for the county board if it believes that there was error in the vote tabulation.

¹⁴Other states have similarly imposed strict election deadlines to protect the important interests of finality and predictability. *See, e.g., Giambrone v. Alberica*, 579 N.Y.S.2d 268 (N.Y. App. 1992) ("[T]ime limits set forth in the Election Law are clear and

Contentions Are Otherwise Without Merit.

Petitioners make a number of additional arguments that we refute in turn:

a.

Petitioners

contend (Petr. Br. 40-44) that the Secretary of State committed legal error in choosing to exercise her discretion in part by reference to factors that courts have looked at in determining whether to overturn elections in contests under Section 102.168.

Petitioners are mistaken.

First, petitioners misstate the nature of the Secretary's reliance on those factors. Rather than relying exclusively on the factors that might justify overturning the election, the Secretary of State merely deemed it appropriate to consider those factors, among others. *See* 11/15/00 Harris Letter. The Secretary also referred to a number of other criteria suggested by the Circuit Court's order, *id.*, and had earlier provided still more

unambiguous and cannot be changed by the court.”); *State ex rel. Shroble v. Prusener*, 517 N.W.2d 169 (Wis. 1994) (candidate failing to request a recount within 3-day statutory time limit was precluded from challenging canvassing mistake); *In re April 10, 1984 Election of East Whiteland Township*, 483 A.2d 1033 (Pa. App. 1984) (mandatory language in election laws with respect to deadlines must be respected); *State ex. rel. Underwood v. Silverstein*, 278 S.E.2d 866 (W.V. 1981) (specific time restraints set forth in election statutes are obligatory and necessary to the orderly conduct of public elections, which require the determination as promptly as possible of those who have been lawfully elected in order that they may fulfill their official duties unfettered by the prospect of lengthy litigation).

detail. *See* 11/13/00 Opinion. Petitioners’ attempt to paint the Secretary as viewing herself as in the position of a judge determining whether to overturn an election is therefore wrong.

Second, petitioners are wrong in claiming that the Section 102.168 factors are inapposite as a matter of law. Section 102.112 does not specify *what* factors the Secretary is to consider in determining whether to waive the statutory deadline, and the Secretary has appropriately concluded that, absent substantial compliance, only extraordinary circumstances justify substituting certified results with the results of late-filed manual recounts. The extraordinary circumstances that would justify overturning an election contest were therefore, as a rough proxy, appropriate to consider in determining whenever an election result is so flawed that an extension would be warranted.

Contrary to petitioners’ contention (Petr. Br. 43) that the Secretary employed the “wrong legal standard” in exercising her discretion, it is plain that Section 102.112 directed her to employ no particular standard. In the absence of a governing standard, the Secretary cannot have employed the wrong one. And it surely is not irrelevant in determining whether to relax the legislature’s rules of finality and uniformity to consider whether the situation is one that might call for a court to overturn an election.

b. Petitioners
contend (Petr. Br. 38-40) that the Secretary of State must wait until any county board

that wishes to conduct a manual recount finishes its work before making a judgment as to whether the results would be accepted. This argument is contrary to law and all reason.

First, there is no requirement in law that the Secretary of State must wait for such results before certifying election returns – indeed, the legislature has made it clear that she *may* ignore results that are not submitted on time *without waiting for their submission*. See §102.112(1), Fla. Stat. It would obviously defeat the entire purpose of allowing tardy results to be ignored to insist that the responsible administrator wait for them to be submitted before acting to certify the election. Indeed, far from being unreasonable to refuse to extend on this basis, it would have been both unreasonable and unlawful for the Secretary of State to decide otherwise. To conclude that the Secretary *must* wait for a manual recount to be completed before reaching a judgment about whether the *circumstances causing it to be late* may be excused would prevent the Commission from discharging its statutory responsibility to certify election results as soon as possible after receiving the certified results from each county. See §102.111, Fla. Stat. And no finality would be available until the last recounting county – which already has certified returns on file – tells the Secretary of State that it is finished. Such a system makes no sense, and is plainly contrary to the statutory scheme.

The Secretary of State, moreover, went out of her way to ensure that any circumstances justifying a late manual recount were before her prior to making her determination. Thus she received letters detailing the reasons from interested county boards. She reasonably concluded that insofar as the tardiness of the manual recounts is concerned, permitting the recounts pointlessly to proceed would be inappropriate. Thus, she reasonably informed the county boards that a waiver of the firm statutory deadline would not be permitted, and that the already-certified election results would be used. Petitioners cannot point to a single word in any statute or other authority which would require the Commission to delay final election certification until such time that a county board conducting a manual recount finishes its work.

Rather than acceding to Petitioners' desperate attempt to have this Court substitute its judgment for the Secretary of State's, we submit that the Secretary of State deserves this Court's commendation. The Secretary of State has acted, in the most difficult of circumstances, in a reasoned fashion that is consistent with the law and with uniform past practice in certifying elections in the State of Florida.

I I I .

**IT WOULD HAVE BEEN UNLAWFUL FOR THE SECRETARY
OF STATE TO EXTEND THE STATUTORY DEADLINE ON
THE GROUND THAT SOME COUNTY BOARDS WISH TO
COMPLETE A MANUAL RECOUNT.**

Although the Court need not reach the issue, the Secretary is without authority to accept returns after the statutory deadline under Section 102.111(1), Florida Statutes, which provides:

The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. . . . *If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.* (emphases added)

Section 102.111 thus sets a hard and specific deadline for final returns – “5 p.m. on the seventh day following an election.” Once that time is reached, “the returns on file *shall be certified.*” *Id.*

It would be wrong to interpret Section 102.112’s language stating that election returns from a tardy county “may be ignored” as revoking the mandatory nature of Section 102.111’s instructions to the Commission. First, the legislature did not repeal Section 102.111 when it enacted Section 102.112, and it is a well settled principle of statutory interpretation that implied repeals are disfavored. *See City of St. Petersburg v. Pinellas County Power Co.*, 87 Fla. 315, 319 (1924)(“[i]t is familiar law that repeals

by implication are disfavored An interpretation leading to such a result should not be adopted *unless it be inevitable.*”); *Oldham v. Rooks*, 361 So.2d 140, 143 (Fla. 1978) It is plain in these circumstances that no contrary interpretation is “inevitable.”

Section 102.111 defines the obligations of the *Commission*, and it specifies that it “shall certify.” Section 102.112 defines the obligations of the *county* canvassing boards. It states that “[r]eturns *must be filed* by 5 p.m. on the 7th day,” and that, if they are not, they “may be ignored.” The word “may” need not, and should not, be interpreted as authorizing a general discretion to the Commission; rather, it can be interpreted as describing the risks to a county board if their returns are tardy. And Section 102.112 plainly requires county boards to meet the deadline regardless of whether their returns will be ignored if they are late.

The decision in *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988), illustrates why it is merely a risk and not a certainty that a county board’s failure to certify in time will result in the disregarding of its returns. In *Chappell*, the Court held that the Commission had not erred in refusing to disregard a county’s returns – even though the county board had failed to mail in its certification within the deadline – because those returns had been conveyed over the telephone and that constituted “substantial compliance.” Thus, Section 102.112, which was enacted in the wake of the decision in *Chappell*, clarified that in some circumstances a county’s returns may or may not

be ignored, depending on whether there is substantial compliance with the board's certification obligation. But neither the decision in *Chappell* nor the subsequent enactment of Section 102.112 altered the underlying obligation on the *Commission* pursuant to Section 102.111 that it shall certify the results as soon as possible after the statutory seven-day deadline.

The drafting background and legislative history of Section 102.112 strongly supports the conclusion that the Secretary of State is required to ignore results from counties that miss the seven-day deadline. On May 31, 1989, the Florida House passed a bill, Fla. HB 1362 (1989), that added the new section 102.112, which includes the provision that “[i]f the returns are not received by the department by 5 p.m. on the 7th day after an election and such returns may be ignored and the results on file at that time may be certified by the department.” 1989 Senate Journal, p. 819. The Senate bill incorporated the new Section 102.112 but *also* amended the last sentence of the then-existing section 102.111 to read as follows: “If the county returns are not received by the Department of State by 5 p.m. of the *thirteenth* day following an election, all missing counties *may be omitted*, and the results shown by the returns on file certified.” (emphasis added). *Id.* Thus, the Senate bill as proposed would have explicitly and unambiguously repealed the mandatory requirement to ignore late returns and replace it with a discretionary option.

On June 2, 1989, however, the House took up the bill again. House Amendment to Senate Amendment, 1989 House Journal, p. 1320. The House agreed to the Senate bill's modifications to Section 102.112, but *rejected* the Senate's modifications to the last sentence of Section 102.111. The bill was then reconsidered by the Senate that same day, and the Senate agreed to the House version. Chapter 89-338 §30 at 2162, Laws of Florida.

The House and the Senate thus both specifically considered a modification to Section 102.111 that would have weakened the requirement that the Secretary of State “shall . . . ignore[]” returns from counties that have failed to meet the seven-day deadline. That is the exact reading of the statute urged by Petitioners in this case. It was rejected by the Florida Legislature and should be rejected by this Court.

Thus both the text and history of the relevant statutes indicate that the only reasonable construction of Section 102.111 and Section 102.112's interaction is to recognize that the deadline imposed upon the Commission by Section 102.111 is firm and unyielding absent extraordinary circumstances analogous to those in *Chappell*. Even if that were not the case, however, and the statutes were open to other reasonable interpretations, it would nonetheless be the “court's obligation . . . to adopt an interpretation that harmonizes two related statutory provisions while giving effect to both.” *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987); *See also*,

State ex rel. School Board of Martin County v. Department of Education, 317 So.2d 68, 72 (Fla. 1975).

State law also requires the Secretary to ensure uniformity in the administration of the election laws. *See* §97.012(1), Fla. Stat. Florida law (and election law generally) reflects the strong value that voters within a jurisdiction are to be treated equally and uniformly. Thus, all voters are required to vote on (or by, in the case of absentee voters) the same date; their votes are to be counted by the same process; and according to the same timetable. To be sure, Florida has tempered its goal of uniformity by providing for selected manual counts, *see* §102.166, Fla. Stat. but it has emphatically not provided that the timing by which those results are certified is to vary from the timing applicable to the rest of the votes in the state.

In the present context, *federal* law also places additional constraints on courts that require them strictly to adhere to the legislature's prescribed manner for conducting an election to choose the State's presidential electors. Under 3 U.S.C. §5, a State is required to select its electors "by laws enacted *prior* to" election day. *See* 3 U.S.C. §5 (emphasis added). The purpose of the statute is to ensure that neither the Legislature, nor the Executive, nor the courts can change the applicable rules once the voters have gone to the polls. Florida law on November 7, 2000, unambiguously required county canvassing boards to count, and recount if necessary, and manually

recount if they chose, within the time prescribed by law. Under Section 102.112 the Secretary of State was given discretion sometimes not to ignore late results. But no provision of state law in effect prior to the election, however, granted *courts* equitable power to disregard both the deadline and the Secretary's exercise of reasoned discretion.¹⁵ It would also violate the United States Constitution for the Secretary of State to permit the 3 counties to complete its manual recount and certify those results. The selective manual recounts authorize county boards to engage in arbitrary and unequal counting of votes, and result in the disparate treatment of Florida voters based solely on where within the state they happen to reside.

¹⁵ Indeed, by operation of the Supremacy Clause, Article VI, U.S. Constitution, federal law incorporates by reference whatever processes a state establishes by law for choosing electors. The United States Constitution provides that the *legislatures* of the States will prescribe the manner in which presidential electors are chosen, Article II, Section 1 U.S. Constitution and Congress has provided in federal law that “[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November” in an election year. 3 U.S.C. § 1. Congress has further provided that if a State “has failed to make a choice on the day prescribed by law,” it falls to the legislature of the State to determine how the electors will be appointed. 3 U.S.C. § 2. In the present case, the day prescribed by law was Tuesday, November 7, and the State of Florida held an election on that day *subject to the procedures, including reporting procedures and deadlines, established by state law*. It follows, therefore under the relevant federal statutes and the Supremacy Clause that all actors at the state level - including judges -- are bound to respect the choices made by the Florida legislature as to the process of selecting the state's presidential electors. It would therefore violate federal law for the state *courts* to use equitable doctrines to supplement the *legislature's* judgment, reflected in the statutes of the state, regarding the methods and time limits for selecting presidential electors.

This scheme, as applied, violates the United States Constitution in three respects. First, it dilutes the votes of Florida voters, both within and without the counties that are manually counted, by counting their votes differently based upon where they reside, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974). Second, because the manual recount statute prescribes no meaningful standards for officials conducting such recounts, it permits the invasion of the liberty interest in voting in an arbitrary and capricious manner. *See, e.g., Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995). Finally, because the right to vote directly implicates the right of association under the First Amendment, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), it falls squarely within the principle that state actors cannot exercise unconstrained discretion over the implementation of laws that touch upon First Amendment rights. *See City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 763 (1988). For these reasons, allowing the manual recounts to proceed would violate the United States Constitution.

I V .
**PETITIONERS ARE NOT ENTITLED TO INJUNCTIVE
RELIEF BECAUSE THEY FAILED TO MAKE THE
NECESSARY SHOWING OF IRREPARABLE HARM AND
BALANCE OF THE EQUITIES.**

Petitioners are also not entitled to the relief they seek for the independent reasons that they have an adequate remedy at law, and that an injunction is plainly not in the public interest.

First, Petitioners have an adequate alternative remedy because Florida law provides for contests to be filed after-the-fact by unsuccessful candidates or qualified electors. *See* §102.168, Fla. Stat. The contest mechanism provides an adequate and therefore exclusive avenue for relief if Petitioners are correct that the Secretary of State was legally bound to accept late-filed returns.

Second, Petitioners failed to show that the public interest calls for the entry of injunctive relief. As noted, petitioners have not acted with the sort of dispatch in performing the manual recounts that would remotely justify this Court's holding that it was literally impossible for them to comply with the legislature's statutory deadline.¹⁶ It would be highly inequitable to keep the State and Nation on hold to finish a manual

¹⁶ The Miami-Dade County Canvassing Board, which is not a party to this litigation but which, according to public reports is currently conducting a manual recount, did not even *meet* to vote on a manual recount until Tuesday, November, 14, the deadline set by the legislature.

recount when the responsible officials failed expeditiously even to begin the process.

The unprecedented events that have brought us to this point are obviously of the highest public interest. Extraordinary times call, however, for courts to adhere steadfastly to the rule of law. The rule of law is indispensable if the right of the people to pick their leaders, through a full and fair process according to rules applicable to all, is to be vindicated.

CONCLUSION

For the foregoing reasons, this Court should dissolve the injunction entered on Friday, November 17, 2000, and affirm the judgment of the Circuit Court.

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Sunday, November 19, 2000

CASE NOS.: SC00-2346, SC00-2348 & SC00-2349
PALM BEACH COUNTY vs. KATHERINE HARRIS, ETC., ET AL.
CANVASSING BOARD

VOLUSIA COUNTY vs. MICHAEL MCDERMOTT, ET AL.
CANVASSING BOARD

FLORIDA DEMOCRATIC PARTY vs. MICHAEL MCDERMOTT, ET AL.

Petitioners/Appellants

Respondents/Appellees

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Supreme Court of Florida

Sunday, November 19, 2000

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CERTIFICATE OF FONT

This brief and Petitioner’s Initial Brief have been printed in New Times New Roman 14 point with 10 characters per inch.

This Court repeatedly has recognized that “the electorate’s effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding elections.” *Chappell v. Martinez*, 536 So.2d 1007, 1008 (Fla. 1988); see also Initial Brief at 35-36. The Secretary of State and Governor Bush nonetheless urge this Court to construe Florida law to prevent county canvassing boards – which are charged under Florida law with primary responsibility for counting ballots – from utilizing the procedures long established in Florida law (and in the laws of many other States) to ascertain the electorate’s will in close elections such as this one. This Court should reject that approach.¹

I. THIS COURT SHOULD HOLD THAT COUNTY CANVASSING BOARDS MUST APPLY THE OBJECTIVE INTENT STANDARD TO DETERMINE WHETHER TO COUNT A BALLOT

A. THIS COURT MAY AND SHOULD EXERCISE ITS EQUITABLE POWER IN THIS CASE, GIVEN THE TIMING AND IMPORTANCE OF THIS ISSUE

This Court has broad authority under the Florida Constitution to issue all writs necessary and proper to the complete exercise of its jurisdiction. Article V, Section 5, Florida Constitution. *See Monroe Education Assoc. v. Clerk, District Court of Appeal, Third Circuit*, 299 So.2d 1 (Fla. 1974). Due to the unique and extraordinary

¹ Appellees challenge this Court’s jurisdiction. As we discussed in our initial brief (at pages 25-29), ample authority establishes the Court’s jurisdiction in these cases. Exercise of that jurisdiction is plainly appropriate – indeed, essential – in the extraordinary circumstances presented here.

circumstances of the current Presidential election recount, the expedited time frame in which the issue must be addressed, and the fundamental public interest in resolving this matter equitably, this Court should exercise its jurisdiction.

As discussed below, different canvassing boards have used different standards in recounting ballots and the issue has already been considered by several Circuit Courts. This issue must ultimately be resolved by this Court and we urge, in view of the desire for an expeditious resolution of the entire ballot dispute, that it be resolved now.

**B. THIS COURT SHOULD HOLD THAT COUNTY CANVASSING
BOARDS MUST APPLY THE OBJECTIVE INTENT STANDARD TO
DETERMINE WHETHER TO COUNT A BALLOT**

We agree with the Broward County Canvassing Board that this Court should provide guidance with respect to the proper standard that counting teams and county canvassing boards should use in applying Section 102.166(7) as they count individual ballots. That guidance is essential to ensure that the counties use a proper standard – and a uniform standard – as they conduct the manual recounts now underway.

For more than 80 years it has been settled Florida law that a ballot must be counted if the voter’s intent is apparent from an examination of the ballot. *Darby v. State*, 73 Fla. 922, 924, 75 So. 411, 413 (1917), see also Section 101.5614(5), Fla. Stat. The manual recount statute itself provides that counting teams are to manually examine punch card ballots “to determine a voter’s intent” and if they are unable to do

so “the ballot shall be presented to the county canvassing board for it to determine the voter’s intent.” Section 102.166(7)(b). Like all issues of compliance with voting requirements, the issue is “ultimately a judicial question.” *State v. Williams*, 97 Fla. 159, 171, 120 So. 310, 314 (Fla. 1929).

Florida’s objective intent standard is the standard applied in other states as well. As noted in our opening brief, the Supreme Judicial Court of Massachusetts considered the question of whether manual recounts were more reliable than machine counts and, if so, what standard should be used in a manual review of punch card ballots. In *Delahunt v. Johnston*, 423 Mass. 731, 671 N.E. 2d 1241 (1996 Mass.), a unanimous court overturned the declaration of a winner in a Congressional primary based on the court’s own manual review of 956 contested ballots. The court held, “The critical question in this case is whether a discernible indentation made on or near a chad should be recorded as a vote for the person to whom the chad is assigned. The trial judge concluded that a vote should be recorded for a candidate if the chad was not removed but an impression was made on or near it. We agree with this conclusion.” 671 N.E. 2d at 1243. The *Delahunt* court also ruled, consistent with Florida law, that the assessment of individual disputed ballots was ultimately a question of law for the court. *Id.*

The objective intent standard as expressed in Florida law and in *Delahunt* is part of an extensive and comprehensive body of law, well-established throughout the

states, that if a voter has marked a ballot in a manner that cannot be read by a machine, but the voter's intent can be discerned from the ballot, that ballot must be counted. *See Stapleton v. Board of Elections*, 821 F. 2d 191 (3d Cir. 1987) ("Absent an unequivocal legislative intent to the contrary, we are compelled to uphold the voter's intent to the extent it can be ascertained."); *Democratic Party of the Virgin Islands v. Board of Elections*, 649 F. Supp. 1549 (D.R.V.I. 1986) ("the intention of the elector must be paramount"); *Duffy v. Mortensen*, 497 N.W. 2d 437, 439 (S.D. 1993) (vote should not be excluded because voter's "hand was unsteady or his vision impaired" so long as intent is clear, because "a voter [that] displays a restrained enthusiasm in marking his ballot . . . should not render his effort in vain"); *Hickel v. Thomas*, 588 P. 2d 273, 274 (Alaska 1978) (unperforated punch card ballots marked by pen are counted because they reflect voter's intent); *Fischer v. Stout*, 741 P. 2d 217 (Alaska 1987); *Escalante v. City of Hermosa*, 195 Cal. App. 3d 1009, 241 Cal. Rptr. 199 (1987); *Wright v. Gettinger*, 428 N.E. 2d 1212, 1225 (Ind. 1981) (ballots with partially attached chads counted because they reflect voter's intent).

Indeed, in Illinois, the Supreme Court in *Pullen v. Mulligan*, 561 N.E. 2d 585, 611 (1990) held that a manual recount was required to implement the intent of voters even though Illinois statutes (unlike those of Florida and many other states) did not expressly provide for manual recounts.

Unfortunately, among the other unusual events of the last two weeks, there has been a concerted effort to induce canvassing boards to apply a more narrow, per se standard that requires detachment of the chad. For example, the Broward County Canvassing Board adopted a rule in its initial recount that required that at least two corners of the chad be detached before a ballot would be counted. The Board reached this conclusion after being told by a lawyer that “Texas has a law that says that there must be two or more detached” corners from a chad to be counted. (R.App. 3, p. 69) The Board in announcing its standard said it wanted “the record to reflect” that its standard “comports with and is analogous to Texas statutory law.” (R.App. 3, p 81)

The information supplied to the Broward Board was simply not true. Texas law expressly provides that a ballot be counted if any one of the following are true:

- “(1) at least two corners of the chad are detached;
- (2) light is visible through the hole;
- (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote;² or

² Numerous national news stories over the past ten days have reported on the inaccuracies of some ballot counting machines, including the types at issue here, and the manners in which various jurisdictions have determined voter intent. Brooks Jackson, “‘Hanging Chads’ often viewed by courts as sign of voter intent” and “Brooks Jackson examines mechanics of voting machines.” CNN-on-line, November 16 and 17, 2000.

- (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote.” (Title 8, Section 127.130(d))

Moreover, Texas statutes provide that the foregoing criteria is not exhaustive and that a ballot should be counted if there is other evidence of “any clearly ascertainable intent of the voter” (Section 127.130(e)) – which could include instances where the chad was not disturbed at all or when a voter marked a punch card ballot with a pen.

On November 17, 2000 the Circuit Court in Broward County orally instructed the Broward Board to count “pregnant chads and all this other stuff that’s supposed to show the totality of the ballot and show the intent of the voter,” (R.App. Ex. 2 pp. 21-23).³ The next day the Chairman of the Board declared that “for the sake of consistency and the sake of organization” the Board would “continue to do what we have been doing with the assurance that any ballots that have to be reconsidered are segregated” until the Board received a formal order. (R.App. Ex. 4, pp. 6, 10) The Chairman of the Broward County Board acknowledged there are “hundreds of more votes in this county that will be counted” if the objective intent standard directed by the Circuit Court were employed instead of the per se “two corner” rule. (R.App. Ex. 4, p. 10)

This Court should confirm an objective intent standard that would enfranchise Florida’s voters by counting the votes of all who indicated their intent on their ballots, and reaffirm the long-standing election philosophy of this state – that its election laws

³ The Palm Beach County Circuit Court has similarly held that Palm Beach Canvassing Commission’s “present policy of a per se exclusion of any ballot that does not have a partially punched or hanging chad, is not in compliance with the law.” *Florida Democratic Party v. Palm Beach county Canvassing Board*, No. CL 00-11078AH (Fla. 15th Judicial Circuit). (R.App. Ex. 5)

shall be interpreted to effectuate the will of the people. *See Republican State Executive Committee v. Graham*, 388 So. 2d 556 (1980 Fla.).

II. THE SECRETARY COULD NOT PROPERLY EXERCISE DISCRETION TO EXCLUDE THE RESULTS OF MANUAL RECOUNTS

The Court is presented here with two clear issues of law that can be decisively resolved on the basis of the record before it. First, whether the Secretary has discretion to reject manually counted votes. Second, if she has such discretion, whether she has applied the incorrect legal standard in exercising it.

A. THE SECRETARY DOES NOT HAVE DISCRETION TO REJECT VALID MANUALLY COUNTED VOTES AFTER THE SEVEN DAY DEADLINE

The Appellees insist that the results of recounts that last beyond seven days must be disregarded in either all or in all but the narrowest of circumstances. This argument, however, makes a hash of the relevant statutory provisions, disregards the manifest legislative intent, and misunderstands the nature of the Secretary's discretion.

Appellees' Approach Would Produce Arbitrary Results

If Appellees were correct in asserting that the results of any statutorily mandated recount that continues beyond the seven day "deadline" must be rejected, the following unintended consequences would follow:

- Full manual recounts could almost never be completed timely in Florida's larger counties;
- The counties would be obligated by law in certain circumstances to undertake full manual recounts (based upon the results of sample counts), knowing, to a certainty, that the full recount could not be completed in time for the results to be considered; and
- The provision of Section 102.166 which permits an interested party to seek a recount at any time prior to the Canvassing Board's certification, would be rendered a nullity.

Appellees' approach is inconsistent with the legislative intent.

Appellees contend that virtually the only imaginable circumstance in which county returns will not be forwarded to the Secretary within the seven-day period is one in which a § 102.166 recount is proceeding, and that the Legislature therefore must specifically have intended §§ 102.111 and 102.112 to apply to recounts. The Appellees' assertion, however, is demonstrably false. In fact, § 102.112 was enacted in response to *Chappell v. Martinez*, 536 So.2d 1007 (Fla. 1988), in which a county was late in filing its returns through what appears to have been an administrative oversight; the case had nothing to do with recounts. See Laws 1989, c. 89-338, § 30, eff. Jan. 1, 1990, codified at 102.112, Fla. Stat. That type of situation, and not the

wholly different circumstance of an ongoing recount, doubtless is what the Legislature had in mind in enacting the seven-day deadline.

The statutory provisions can be reconciled only by reading the seven-day deadline to be inapplicable when a recount that may change the vote tabulations is proceeding.

The Appellees' argument that the results of recounts lasting beyond seven days must be ignored rests on hyperbole and a misunderstanding of our position. We do not read Sections 102.111 and 102.112 out of the statute. Rather, our position is that the interaction of those provisions and Section 102.166 *in the particular context of recounts*, makes it improper for the Secretary to disregard properly recounted votes. Unlike any of the other situations hypothesized by the Appellees, an ongoing recount is intended to determine the proper tabulation of votes. And the undeniable fact is that the Legislature provided in Section 102.166 that manually recounted votes trump other results. To exclude votes determined in such a recount, as Appellees propose, would make a mockery of the statutory structure.

Appellees frankly offer a reading of the statute in which recounts will be meaningless even after a canvassing board detects errors in the vote tabulation that could have affected the outcome of the election, in which a canvassing board must conduct recounts that will have no effect, and in which voters inevitably will be disenfranchised. Needless to say, this approach makes no serious attempt to reconcile §§ 102.111 and 102.112 with § 102.166 – and thus takes no account of the rules of

statutory construction applied by this Court, requiring a reading the statutory structure as a coherent whole. When the proper reading is accorded the statutory structure, it is plain that is best accomplished by that §§ 102.111 and 102.112 can have no application when the vote tabulation process, in the form of a manual recount, is continuing.

This reading is confirmed by longstanding practice.

The Secretary in the past has repeatedly accepted the results of recounts that extended beyond seven days. See, e.g. *Ballots To Be Manually Recounted*, Orlando Sentinel Tribune (Nov. 10, 1998); *Board Okays Race Recounts*, St. Petersburg Times (Apr. 24, 1992). Nor are we aware of any prior case in which the Secretary purported to exclude such results or to fine a county canvassing board for submitting them late (even though appellants' position appears to be that such fines are mandatory).

If we are incorrect in our view that Sections 102.111 and 102.112 have no bearing here, and those provisions are thought to give the Secretary discretion to exclude recounted results in some circumstances, the Appellees plainly are wrong in their assertion that the seven-day deadline is absolute. The Appellees' argument on this point rests entirely on the assertion that the word "shall" always imposes mandatory obligations. In fact, this and other Courts have held repeatedly that examining the context and applying common sense may lead to the conclusion that the statutory use of "shall" is *not* mandatory. See, e.g., *McLean v. Bellamy*, 437 So. 2d

737 (Fla. 1983). In the setting of elections in particular, as held in a number of cases cited in our opening brief, the literal language of a statute should not be applied so as to thwart the electorate's will. Indeed, this Court in *Chappell* rejected the very assertion advanced by the Appellees here: that "section 102.111's 'all missing counties' language turns the certification process into 'an imperative, ministerial' duty, 'involving no judgment on the part' of the state canvassing commission." 536 So.2d at 1008.

**B. TO THE EXTENT THE SECRETARY MAY HAVE
DISCRETION, SHE HAS ABUSED IT**

If the Secretary does have discretion, the crucial question becomes the nature of the standards she must apply. As explained in our opening brief, the Secretary's articulated standards, which she purportedly derived from case law under section 102.168, are inapplicable here because this situation does not involve a contested election. And because the Secretary's standard appears to be inconsistent with her prior practice, it is due no deference. Cf; *Nordheim v. Dept. of Environmental Protection*, 719 So.2d 1212, 1214-1215 (Fla. Dist. Ct. App. 1998). But the Secretary's decision cannot stand even if the Appellees are right in arguing that § 102.168 is relevant. The Secretary borrowed only a *portion* of the standards that apply to contested elections statute that deal with fraud or illegality. But § 102.168 also provides that an election will be set aside if enough legal votes are rejected to

place the outcome in doubt. We will not know whether this provision applies here until the recount is complete. At a minimum, under even her own standard, the Secretary abused her discretion in ruling prematurely.

At bottom, any discretion that the Secretary may have must be exercised in light of the policies expressed in § 102.166. And given that the Secretary is making an administrative decision declining to count validly cast votes, she must have a “compelling reason” to do so. *Chappell*, 536 So.2d at 1008. Here, the only arguably relevant reason articulated by the Appellees for ignoring the recounts is that the canvassing boards supposedly delayed excessively in initiating them. As the “Time Line” appended to this Reply as Ex. 1 demonstrates, however, most, if not all of the delay in this extraordinary case was due to the actions of the Secretary herself, not by any lack of diligence by the canvassing boards. For the Secretary to exercise her discretion to exclude the results of a valid recount in such circumstances is the very definition of capriciousness.

The claim for essentially unreviewable discretion by the Secretary of State is particularly inappropriate – and, indeed, would raise serious Constitutional issues – since she is personally a participant in the controversy to be resolved as a manager of the campaign her purported exercise of discretion benefits. The unprecedented interpretation of law for which the Secretary argues would give her the effective power

to determine who would win close elections by deciding when to cut off the recount process.

III. SECTION 102.166(5) PROVIDES THAT ANY TYPE OF MISTAKE IN VOTE TABULATION DISCOVERED DURING A MANUAL RECOUNT OF SAMPLE PRECINCTS MAY JUSTIFY A MANUAL RECOUNT OF ALL BALLOTS

The Secretary contends that all of the manual recounts now underway are unlawful because they are inconsistent with the Secretary's opinion letters adopting a restrictive reading of Section 102.166(5). That argument is meritless. As the Attorney General demonstrated in his brief and opinion letter, and as we discuss in our opening brief (at pages 13-19), the Secretary's position is completely inconsistent with Florida law.

The argument advanced (without the citation of any authority) by the answering briefs that the results of manual recounts can be rejected in their entirety because they correct only "voter error" is

- (A) inconsistent with the undisputed fact that machines make a predictable number of errors regardless of "voter error"
- (B) inconsistent with the Florida statutory direction to employ a manual recount "to determine the intent of the voter," and

- (C) inconsistent with the unbroken line of authority in Florida and elsewhere that where a voter's intent can be ascertained, that intent, and not the rigid compliance with any method for expressing that intent, controls.
- (D) inconsistent with the secretary's inclusion of manual recount results from several other counties in her certification of this election

This Court should hold the Section 102.166(5) permits a full manual recount to be ordered on the basis of any type of mistake in vote tabulation that "could affect the outcome of the election."

IV. FLORIDA'S MANUAL RECOUNT LAWS COMPLY WITH THE UNITED STATES CONSTITUTION

Governor Bush's brief contains a lengthy attack on manual recounts in general and on the conduct of the recounts now underway. There is no merit to any of these contentions. Manual recounts are an essential element of election laws all around this nation. There is no basis for the novel contention that this long-established process is unconstitutional on its face. Indeed, we submit that the federal Constitution would be violated if Florida election officials failed to faithfully apply these provisions of Florida law.

A. MANUAL RECOUNTS ARE A LONG-ESTABLISHED, BROADLY-ACCEPTED MEANS OF ENSURING THAT ELECTION RESULTS ARE ACCURATE

The question of whether machines are more or less accurate than other methods is not before this Court. That question has already been decided by the Florida legislature in favor of manual recounts. Section 102.166(4)(c), Fla. Stat. specifically authorizes a county canvassing board to conduct a manual recount in response to a written protest by a candidate or political party. See also Section 102.166(5), Fla. Stat. (2000). Prior to its enactment in 1989, no manual recount could be authorized except on the order of a court. See Letter dated May 18, 1989, of Dorothy W. Joyce, Division Director, Division of Elections, to the Honorable Ann Robinson, Supervisor of Elections, Indian River County. (R.App. Ex. p. 11) Addressing county supervisors of elections, the then-Secretary of State indicated his understanding that the new provision would provide local canvassing boards the authority to conduct a manual recount in the event that an election was close and results contested. Memorandum dated April 27, 1989, of Jim Smith, Secretary of State, Florida Department of State, to Supervisors of Elections. (R.App. Ex. 12)

Underlying the addition of a provision for manual recount is an understanding that the process is *more* accurate than machine counts, not less. “In fact, the very premise of a manual recount after an electronic tabulation, as in the case here, is to provide an additional check on the accuracy of the ballot count.” Siegel, 2000 WL 1687185, at *19. Contrary to Respondents’ argument, machine voting was not introduced to eliminate errors from the ballot counting process. It was introduced

because it is faster and more efficient. Respondents complain of “human error” in manual counts. But many studies demonstrate that machine counts of punch card ballots produce significant inaccuracies. See, e.g., Roy G. Saltman, *Accuracy, Integrity, and Security in Computerized Vote-Tallying*, U.S. Dept. of Commerce, National Bureau of Standards (1988).⁴

Strict machine counts can miss many marks made by a voter that the human eye would readily perceive as indicating the voter’s clear intent – for example, circling or

⁴ See also National Bureau of Standards Report, *Effective Use of Computing Technology in Vote-Tallying* (1988) (“It is generally not possible to exactly duplicate a count obtained on pre-scored punch cards.”) In addition, numerous media reports in recent days have cited expert opinion that punch card ballot voting systems are notoriously inaccurate. See e.g. Brooks Jackson, *CNN Breaking News – the Florida Recount*, Nov. 15, 2000 (“Machine counts infallible? Forget about it. The kind of punch card ballot used in Palm Beach is notorious for inaccuracy and has been for years...”); Ford Fessenden, “Counting the Vote,” *N.Y. Times*, Nov. 17, 2000, at A1 (citing many voting machine manufacturers who say that machine inaccuracy ranged from 34,500-3,450 votes in Florida on November 7, and quoting industry officials who state “the most precise way to count ballots is by hand”); David Beiler, “A Short in the Electronic Ballot Box,” *Campaigns & Elections*, July/August, 1989, at 39; Tony Winton, “Experts: Machine Counts Inaccurate,” *AP Online*, Nov. 11, 2000 (noting that “officials in England and Germany consider manual counts to be more accurate than automated ones” and quoting computer scientists for the proposition that “problems with automated vote-counting equipment, especially the computer card punch type used in south Florida, have been well documented” and that error rates of 2 percent to 5 percent are routine); Marlon Manuel, “Recounts: Democratic Official Defends Method That Bush Opposes,” *Atlanta J. & Const.*, November 17, 2000, at A11 (quoting president of company that “sells ballot software to 12 Florida counties, including . . . Palm Beach, Miami-Dade and Broward” for the proposition that “[i]f they're trying to determine a voter's intent, they're not going to get it off our machine or any machine”).

marking an “x” next to the desired candidate’s name, or writing in a candidate’s name without placing a mark to indicate that he or she was writing in a candidate. Given these inaccuracies, manual recounts to check the results of a machine count are certainly an appropriate, and may be the only way to ensure accuracy. See, e.g., Ford Fessenden, “Counting the Vote,” *N.Y. Times*, Nov. 17, 2000, *at A1* (quoting industry officials who state “the most precise way to count ballots is by hand”); Tex. Ele. Code Section 127.201 (“To ensure the accuracy of the tabulation of electronic voting system results, the general custodian of election records shall conduct a manual count of all the races in at least one percent of the election precincts or in three precincts, whichever is greater.”) Indeed, Governor Bush signed into law a Texas statute providing that where both an electronic and manual recount are requested, “[a] manual recount shall be conducted in preference to an electronic recount . . .” See Tex. Elec. Code § 212.005(d).⁵

B. GOVERNOR BUSH’S CHALLENGE TO FLORIDA’S MANUAL RECOUNT LAWS SHOULD BE REJECTED

⁵ As discussed above (at page 4), numerous other jurisdictions have adopted a similar approach.

Despite the manifest need for manual recounts, the Respondents' claims that Florida's manual recount provision violates U.S. Constitutional protections of equal protection, due process and the First Amendment lacks any substance.

First, the claim that voters in some of Florida's counties will suffer vote dilution in violation of the Equal Protection Clause as a result of a manual recount in other counties is demonstrably unsound. *All* qualified voters have a constitutionally protected right to have their votes counted, including those whose ballots were erroneously missed in the automated tabulation. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Moreover, the manual recount provisions of the statute are applicable to all counties and thus all voters. In a case related to the present proceedings, a U.S. District Court found that the manual recount statute was generally applicable and non-discriminatory. *Siegel*, 2000 WL 1687185, at *6. Contrary to Respondents' claims, the vote of a citizen of one county is not "diluted" by a process which ensures that all properly cast votes in another county are actually included in the final vote count.

Second, Respondents assert that the measure of discretion given to county canvassing boards in approving recounts and in the conduct of recounts somehow renders the Florida statute so arbitrary and capricious that it constitutes a denial of Respondents' due process rights. Respondents' principal complaint here seems to be that in the case of a manual recount in Florida, there are no precise standards for the examination of a punch card ballot and the determination of the voter's intent. That

claim is false. The statute does indeed provide standards and safeguards for the process. Most importantly, the examination is directed to “determine the voter’s intent.” § 102.166(7). The recounts are open to the public, § 102.166(6), and the counting teams of at least two electors including, when possible, members of at least two political parties. When the bipartisan team cannot determine the voter’s intent, the ballot is presented to the canvassing board for its review under the same standard. Moreover, this is precisely the type of vote counting matter that the federal courts uniformly leave to the States, *Roudebush v. Hartke*, 504 U.S. 15 (1972).

Respondents also try to fashion a Constitutional claim based on the discretion given to county canvassing boards to decide whether to order a manual recount. As an equal protection argument, this is addressed above. For due process purposes it is sufficient that the basic standard established by § 102.166(5) is reason to believe that there has been “an error in the vote tabulation which could affect the outcome of the election.” But perhaps even more important are the consequences of the points made above—a manual recount can only make the counting of the votes more inclusive and more accurate, not less so.

Third, Respondents appear to argue that, because First Amendment rights may be touched by regulatory aspects of the voting process, any discretion afforded to a state election official in the administration of voting laws necessarily violates that constitutional right. This argument also is without merit.

**C. U.S. AND FLORIDA CONSTITUTIONS PROHIBIT THE
DISENFRANCHISEMENT OF VOTERS BASED ON THE
OPERATION OF A DEADLINE NOT WITHIN A VOTER'S
CONTROL**

It is well established that machine tabulation of votes fail to capture votes cast by a large number of voters, particularly when the number of votes cast is substantial – almost six million in the case of Florida's Presidential election. Machine tabulation of these votes, without some additional process for counting the votes that the machines fail to tabulate, results in the disenfranchisement of countless voters.

This Court need not face here the question whether the U.S. or Florida Constitution requires some sort of protection against this random disenfranchisement of voters, because the State of Florida has established a procedure to correct this potential harm: the manual recount in cases where the an error in vote tabulation is established. See Fla. Stat. Section 102.166 (2000).

However, this Court does need to address whether a state official such as the Secretary of State, through the establishment of a deadline for the submission of manual recounts, can disenfranchise those voters whose votes have not yet been tabulated at the expiration of that deadline. This is particularly so when the failure of the voter's vote to be included in the tally rests not on some action of the voter him or herself, but upon the pace of the County Canvassing Boards, laboring under obstacles imposed by the Secretary of State, in tallying those votes.

While deadlines are a part of the electoral process – there are deadlines for absentee ballots, and even limited hours for voting on election day – a voter’s loss of franchise due to a failure to comply with these deadlines is something within that voter’s control. At the same time, it is well established that it is violative of the U.S. and the Florida Constitutions to deprive someone of a legal right based on the expiration of a deadline due – not to that person’s action or inactions – but based on the inaction of a state or local official. See *Logan v. Zimmerman*, 455 U.S. 422, 433-438 (1982); *Meola v. Department of Corrections*, 732 So.2d 1029, 1035-1037 (Fla. 1998).

If the circuit court’s order stands, hundreds or perhaps thousands of Floridians will lose the right to have their ballots tabulated, not by virtue of their own action or inaction, but by virtue of the failure of their local Canvassing Boards to comply with an arguably unlawful timetable set by the Secretary of State. Depriving these citizens of their right to have their votes counted by virtue of the actions or inactions of either county or state officials (or both) is violative of the U.S. Constitution’s Due Process and Equal Protection Clauses, and the similar provisions of the Florida Constitution. See U.S. Const., Art. XIV; Fla. Const. Art. I, Sec. 2; Fla. Const., Art I., Sec. 9.

CONCLUSION

This Court should enter an order (1) Confirming that the objective intent standard remains the law in the State of Florida; (2) directing the Secretary and the

Elections Canvassing Board not to declare the winner of the Presidential election until they receive the results of manual recounts now underway and then include those results in the “official results” (Section 102.111); (3) declaring the Secretary’s opinion letters are invalid; and (4) denying all relief requested by Respondents/Appellees.

Respectfully submitted this 19th day of November, 2000.

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November 21, 2000

**Ruling to Extend Deadline and Certify Results of Manual Recounts -
Nov. 21**

Supreme Court of Florida

Nos. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, etc., et al.,
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, et al.,
Appellants,
vs.
KATHERINE HARRIS, etc., et al.,
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, etc., et al.,
Appellees.

[November 21, 2000]

PER CURIAM.

We have for review two related trial court orders appealed to the First District Court of Appeal, which certified the orders to be of great public importance requiring immediate resolution by this Court (Case Numbers SC00-2348 and SC00-

2349). We have jurisdiction under article V, section 3(b)(5) of the Florida Constitution. For the reasons set forth in this opinion, we reverse the orders of the trial court.¹

I. FACTS

A. The Election

On Tuesday, November 7, 2000, the State of Florida, along with the rest of the United States, conducted a general election for the President of the United States. The Division of Elections (“Division”) reported on Wednesday, November 8, that George W. Bush, the Republican candidate, had received 2,909,135 votes, and Albert Gore Jr., the Democratic candidate, had received 2,907,351 votes. Because the overall difference in the total votes cast for each candidate was less than one-half of one percent of the total votes cast for that office (i.e., the difference was 1,784 votes), an automatic recount was conducted

¹ The Palm Beach County Canvassing Board has filed in this Court an “Emergency Petition for Extraordinary Writ” against Secretary of State Katherine Harris and others (Case Number SC00-2346). We have examined our jurisdiction under article V, section 3(b)(8) of the Florida Constitution. However, because the issue raised by that separate petition can be disposed of in our pending case and because we have previously stated in our order of November 16, 2000, that there was “no legal impediment” to the manual recounts continuing, we deem it unnecessary to determine if we have a separate basis of jurisdiction for entertaining the writ. Accordingly, by separate order we dismiss the petition.

pursuant to section 102.141(4), Florida Statutes.² The recount resulted in a substantially reduced figure for the overall difference between the two candidates.

In light of the closeness of the election, the Florida Democratic Executive Committee on Thursday, November 9, requested that manual recounts be conducted in Broward, Palm Beach, and Volusia Counties pursuant to section 102.166, Florida Statutes (2000).³ Pursuant to section 102.166(4)(d), the county canvassing boards of these counties conducted a sample manual recount of at least one percent of the ballots cast. Initial manual recounts demonstrated the following: In Broward County, a recount of one percent of the ballots indicated a net increase of four votes for Gore; and in Palm Beach County, a recount of four sample precincts yielded a net increase of nineteen votes for Gore. Based on these recounts, several of the county canvassing boards determined that the manual recounts conducted indicated “an error in the vote tabulation which could affect the outcome of the election.” Based on this determination, several canvassing boards

²Section 102.141(4), Florida Statutes (2000), provides in pertinent part:

(4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office . . . the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure.

³We have not discussed the events in Miami-Dade County because Miami-Dade is not a party nor has it sought to intervene in this case.

voted to conduct countywide manual recounts pursuant to section 102.166(5)(c).

B. The Appeal Proceedings

Concerned that the recounts would not be completed prior to the deadline set forth in section 102.111(1), Florida Statutes (2000), requiring that all county returns be certified by 5 p.m. on the seventh day after an election, the Palm Beach County Canvassing Board, pursuant to section 106.23, Florida Statutes (2000), sought an advisory opinion from the Division of Elections, requesting an interpretation of the deadline set forth in sections 102.111 and 102.112. The Division of Elections responded by issuing Advisory Opinion DE 00-10, stating that absent unforeseen circumstances, returns from the county must be received by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

Relying upon this advisory opinion, the Florida Secretary of State (the Secretary) issued a statement on Monday, November 13, 2000, that she would ignore returns of the manual recounts received by the Florida Department of State (the Department) after Tuesday, November 14, 2000, at 5:00 p.m. The Volusia County Canvassing Board (the Volusia Board) on Monday, November 13, 2000, filed suit in the Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking declaratory and injunctive relief, and the candidates and the Palm Beach

County Canvassing Board (the Palm Beach Board), among others, were allowed to intervene. In its suit, the Volusia Board sought a declaratory judgment that it was not bound by the November 14, 2000, deadline and also sought an injunction barring the Secretary from ignoring election returns submitted by the Volusia Board after that date.

The trial court ruled on Tuesday, November 14, 2000, that the deadline was mandatory but that the Volusia Board may amend its returns at a later date and that the Secretary, after “considering all attendant facts and circumstances,” may exercise her discretion in determining whether to ignore the amended returns.⁴ Later

⁴The trial court’s order reads in part:

The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of state, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner.

Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.

that day, the Volusia Board filed a notice of appeal of this ruling to the First District Court of Appeal, and the Palm Beach Board filed a notice of joinder in the appeal.

Subsequent to the circuit court's order, the Secretary announced that she was in receipt of certified returns (i.e., the returns resulting from the initial recount) from all counties in the State. The Secretary then instructed Florida's Supervisors of Elections (Supervisors) that they must submit to her by 2 p.m., Wednesday, November 15, 2000, a written statement of "the facts and circumstances" justifying any belief on their part that they should be allowed to amend the certified returns previously filed. Four counties submitted their statements on time. After considering the reasons in light of specific criteria,⁵ the Secretary on Wednesday,

McDermott v. Harris, No. 00-2700, unpublished order at 7 (Fla. 2d Cir. Ct. Nov. 14, 2000).

⁵The criteria considered by the Secretary are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a

November 15, 2000, rejected the reasons and again announced that she would not accept the amended returns but rather would rely on the earlier certified totals for the four counties. The Secretary further stated that after she received the certified returns of the overseas absentee ballots from each county, she would certify the results of the presidential election on Saturday, November 18, 2000.

On Thursday, November 16, 2000, the Florida Democratic Party and Albert Gore filed a motion in Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking to compel the Secretary to accept amended returns. After conducting a hearing, the court denied relief in a brief order dated Friday, November

mechanical malfunction of the voting tabulation system. McDermott v. Harris, No. 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000).

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. Beckstrom. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) (“[M]ere confusion does not amount to an impediment to the voters’ free choice if reasonable time and study will sort it out.”).

3. Where there is nothing “more than a mere possibility that the outcome of the election would have been effected.” Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000).

17, 2000.⁶ That day, both the Democratic Party and Gore appealed to the First District Court of Appeal, which consolidated the appeals with the Volusia Board's appeal already pending there, and certified both of the underlying trial court orders to this Court based on the Court's "pass-through" jurisdiction.⁷ By orders dated Friday, November 17, 2000, this Court accepted jurisdiction, set an expedited briefing schedule, and enjoined the Secretary and the Elections Canvassing Commission (Commission) from certifying the results of the presidential election until further order of this Court.⁸

II. GUIDING PRINCIPLES

Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle

⁶The court's order reads in part:

On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My order requires nothing more.

McDermott v. Harris, No. 00-2700, unpublished order at 2 (Fla. 2d Cir. Ct. Nov. 17, 2000).

⁷See Art. V, § 3(b)(5), Fla. Const. ("[The Court may] review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance . . . and certified to require immediate resolution by the supreme court.").

⁸Subsequently, the Volusia Board moved to voluntarily dismiss its appeal in this Court. The Court granted the motion, but indicated that the case style would remain the same and that Gore and the Palm Beach Board "would continue as intervenors/appellants in this action."

in election cases:

[T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of upmost importance to the people, thus subordinating their interest to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). We consistently have adhered to the principle that the will of the people is the paramount consideration.⁹ Our goal today remains the same as it was a quarter of a century ago, i.e., to reach the result that reflects the will of the voters, whatever that might be. This fundamental principle, and our traditional rules of statutory construction,

⁹ See State ex rel. Chappell v. Martinez, 536 So. 2d 1007, 1009 (Fla. 1988) (holding that disenfranchisement of voters is not proper where there has been substantial compliance with the election statute and the intent of voter can be ascertained); Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720, 726 (Fla. 1998) (holding that courts should not frustrate will of voters if that will can be determined).

guide our decision today.

III. ISSUES

The questions before this Court include the following: Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?¹⁰

IV. LEGAL OPINION OF THE DIVISION OF ELECTIONS

The first issue this Court must resolve is whether a County Board may conduct a countywide manual recount where it determines there is an error in vote tabulation that could affect the outcome of the election. Here, the Division issued opinion DE 00-13, which construed the language “error in vote tabulation” to exclude the situation where a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched.

Florida courts generally will defer to an agency’s interpretation of statutes and

¹⁰Neither party has raised as an issue on appeal the constitutionality of Florida’s election laws.

rules the agency is charged with implementing and enforcing.¹¹ Florida courts, however, will not defer to an agency's opinion that is contrary to law.¹² We conclude that the Division's advisory opinion regarding vote tabulation is contrary to law because it contravenes the plain meaning of section 102.166(5).

Pursuant to section 102.166(4)(a), a candidate who appears on a ballot, a political committee that supports or opposes an issue that appears on a ballot, or a political party whose candidate's name appeared on the ballot may file a written request with the County Board for a manual recount. This request must be filed with the Board before the Board certifies the election results or within seventy-two hours after the election, whichever occurs later.¹³ Upon filing the written request for a manual recount, the canvassing board may authorize a manual recount.¹⁴ The decision whether to conduct a manual recount is vested in the sound discretion of the Board.¹⁵ If the canvassing board decides to authorize the manual recount, the

¹¹ See Donato v. American Tel. & Tel.Co., 767 So. 2d 1146, 1153 (Fla. 2000); Smith v. Crawford, 645 So. 2d 513, 521 (Fla. 1st DCA 1994).

¹² See Donato, 767 So. 2d at 1153; Nikolits v. Nicosia, 682 So. 2d 663, 666 (Fla. 4th DCA 1996).

¹³ § 102.166(4)(b), Fla. Stat. (2000).

¹⁴ § 102.166(4)(c), Fla. Stat. (2000).

¹⁵ See Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

recount must include at least three precincts and at least one percent of the total votes cast for each candidate or issue, with the person who requested the recount choosing the precincts to be recounted.¹⁶ If the manual recount indicates an “error in the vote tabulation which could affect the outcome of the election,” the county canvassing board “shall”:

- (a) Correct the error and recount the remaining precincts with the vote tabulation system;
- (b) Request the Department of State to verify the tabulation software; or
- (c) Manually recount all ballots.

§ 102.166(5)(a)-(c), Fla. Stat. (2000) (emphasis added).

The issue in dispute here is the meaning of the phrase "error in the vote tabulation" found in section 102.166(5). The Division opines that an “error in the vote tabulation” only means a counting error resulting from incorrect election parameters or an error in the vote tabulating software. We disagree.

The plain language of section 102.166(5) refers to an error in the vote tabulation rather than the vote tabulation system. On its face, the statute does not include any words of limitation; rather, it provides a remedy for any type of mistake made in tabulating ballots. The Legislature has utilized the phrase "vote tabulation system" and "automatic tabulating equipment" in section 102.166 when it intended

¹⁶ See § 102.166(4)(d), Fla. Stat. (2000).

to refer to the voting system rather than the vote count. Equating "vote tabulation" with "vote tabulation system" obliterates the distinction created in section 102.166 by the Legislature.

Sections 101.5614(5) and (6) also support the proposition that the "error in vote tabulation" encompasses more than a mere determination of whether the vote tabulation system is functioning. Section 101.5614(5) provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Conversely, section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded. Taken together, these sections suggest that "error in the vote tabulation" includes errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery.

Moreover, section 102.141(4), which outlines the Board's responsibility in the event of a recount, states that the Board "shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast." § 102.141, Fla. Stat. (2000) (emphasis added). Therefore, an "error in the vote tabulation" includes a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count of

a sampling of precincts pursuant to section 102.166(4).

Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Thus, we find that the Division's opinion DE 00-13 regarding the ability of county canvassing boards to authorize a manual recount is contrary to the plain language of the statute.

Having concluded that the county canvassing boards have the authority to order countywide manual recounts, we must now determine whether the Commission¹⁷ must accept a return after the seven-day deadline set forth in sections 102.111 and 102.112 under the circumstances presented.

V. THE APPLICABLE LAW

The abiding principle governing all election law in Florida is set forth in article I, section 1, Florida Constitution:

¹⁷ The Commission is composed of the Secretary of State, the Director of the Division of Elections, and the Governor. See § 102.111, Fla. Stat. In this instance, Florida Governor Jeb Bush has removed himself from the Commission because his brother, Texas Governor George W. Bush, is the Republican candidate for President of the United States. Robert Crawford, Florida Commissioner of Agriculture, has been appointed to replace Florida Governor Jeb Bush. See § 102.111, Fla. Stat.

SECTION 1. Political power.—All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I, § 1, Fla. Const. The constitution further provides that elections shall be regulated by law:

SECTION 1. Regulation of elections.—All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Art. VI, § 1, Fla. Const. (emphasis added).

The Florida Election Code (“Code”), contained in chapters 97–106, Florida Statutes (2000), sets forth specific criteria regulating elections. The Florida Secretary of State is the chief election officer of the state and is charged with general oversight of the election system.¹⁸ The Supervisor of Elections (“Supervisor”) in each county is an elected official¹⁹ and is charged with appointing two Election

¹⁸ § 97.012, Fla. Stat. (2000).

¹⁹ § 98.015, Fla. Stat. (2000).

Boards for each precinct within the county prior to an election.²⁰ Each Election Board is composed of inspectors and clerks,²¹ all of whom must be residents of the county,²² and is charged with conducting the voting in the election, counting the votes,²³ and certifying the results to the Supervisor²⁴ by noon of the day following the election.²⁵ The County Canvassing Board (“Canvassing Board” or “Board”), which is composed of the Supervisor, a county court judge, and the chair of the board of county commissioners,²⁶ then canvasses the returns countywide,²⁷ reviews the certificates,²⁸ and transmits the returns for state and federal officers to the Florida Department of State (“Department”) by 5:00 p.m. of the seventh day following the election.²⁹ No deadline is set for filing corrected, amended, or

²⁰ § 102.012(1), Fla. Stat. (2000).

²¹ § 102.012(1), Fla. Stat. (2000).

²² § 102.012(2), Fla. Stat. (2000).

²³ § 102.012(4), Fla. Stat. (2000).

²⁴ § 102.071, Fla. Stat. (2000).

²⁵ § 102.141(3), Fla. Stat. (2000).

²⁶ § 102.141(1), Fla. Stat. (2000).

²⁷ § 102.141(2), Fla. Stat. (2000).

²⁸ § 102.141 (3), Fla. Stat. (2000).

²⁹ §§ 102.111–.112, Fla. Stat. (2000).

supplemental returns.

The Elections Canvassing Commission (“Canvassing Commission” or “Commission”), which is composed of the Governor, the Secretary of State, and the Director of the Division of Elections, canvasses the returns statewide, determines and declares who has been elected for each office, and issues a certificate of election for each office as soon as the results are compiled.³⁰ If any returns appear to be irregular or false and the Commission is unable to determine the true vote for a particular office, the Commission certifies that fact and does not include those returns in its canvass.³¹ In determining the true vote, the Commission has no authority to look beyond the county’s returns.³² A candidate or elector can “protest” the returns of an election as being erroneous by filing a protest with the appropriate County Canvassing Board.³³ And finally, a candidate, elector, or taxpayer can “contest” the certification of election results by filing a post-

³⁰ §§ 102.111, .121, Fla. Stat. (2000).

³¹ § 102.131, Fla. Stat. (2000) (“If any returns shall appear to be irregular or false so that the Elections Canvassing Commission is unable to determine the true vote for any office . . . the commission shall so certify and shall not include the returns in its determination, canvass, and declaration.”).

³² § 102.131, Fla. Stat. (2000) (“The Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns.”).

³³ § 102.166, Fla. Stat. (2000).

certification action in circuit court within certain time limits³⁴ and setting forth specific grounds.³⁵

VI. STATUTORY AMBIGUITY

The provisions of the Code are ambiguous in two significant areas. First, the time frame for conducting a manual recount under section 102.166(4) is in conflict with the time frame for submitting county returns under sections 102.111 and 102.112. Second, the mandatory language in section 102.111 conflicts with the permissive language in 102.112.

A. The Recount Conflict

Section 102.166(1) states that "any candidate for nomination or election, or

³⁴ See § 102.168(2), Fla. Stat. (2000) (explaining that the action must be filed within ten days after the last Board certifies its returns or within five days after the last Board certifies its returns following a protest).

³⁵ The grounds for contesting an election are set forth in section 102.168(3), Florida Statutes (2000):

- (a) Misconduct, fraud, or corruption . . . sufficient to change or place in doubt the result of the election.
- (b) Ineligibility of the successful candidate
- (c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.
- (d) Proof that any elector, election official or canvassing board member was given or offered a bribe
- (e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question.

any elector qualified to vote in the election related to such candidacy shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn written protest." The time period for filing a protest is "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever is later.

Section 102.166(4)(a), the operative subsection in this case, further provides that, in addition to any protest, "any candidate whose name appeared on the ballot . . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount" accompanied by the "reason that the manual recount is being requested." Section 102.166(4)(b) further provides that the written request may be made prior to the time the Board certifies the returns or within seventy-two hours after the election, whichever occurs later:³⁶

³⁶As discussed in Siegel v. Lepore, 2000 WL 1687185 *6 (S.D. Fla. 2000):

On its face, the manual recount provision does not limit candidates access to the ballot or interfere with voters' right to associate or vote. Instead the manual recount provision is intended to safeguard the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of election ballots. While discretionary in its application, the provision is not wholly standardless. Rather, the central purpose of the scheme, as evidenced by its plain language, is to

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.

§ 102.166, Fla. Stat. (2000) (emphasis added).

A Board “may” authorize a manual recount³⁷ and such a recount must include at least three precincts and at least one percent of the total votes cast for the candidate.³⁸ The following procedure then applies:

(5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the

remedy ‘an error in the vote tabulation which could affect the outcome of the election.’ Fla. Stat. §102.166(5). In this pursuit, the provision strives to strengthen rather than dilute the right to vote by securing, as nearly as humanly possible, an accurate and true reflection of the will of the electorate. Notably, the four county canvassing boards [that were] challenged in this suit have reported various anomalies in the initial automated count and recount. The state manual recount provision therefore serves important governmental interests.

³⁷ The statute does not set forth any criteria for determining when a manual recount is appropriate. See § 102.166(4)(c), Fla. Stat. (2000) (“The county canvassing board may authorize a manual recount.”).

³⁸ § 102.166(4)(d), Fla. Stat. (2000).

election, the county canvassing board shall:

- (a) Correct the error and recount the remaining precincts with the vote tabulation system;
- (b) Request the Department of State to verify the tabulation software; or
- (c) Manually recount all ballots.
- (6) Any manual recount shall be open to the public.
- (7) Procedures for a manual recount are as follows:
 - (a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.
 - (b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

§ 102.166, Fla. Stat. (2000).

Under this scheme, a candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the Code sets no specific deadline by which a manual recount must be completed, logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days. The protest provision thus conflicts with section 102.111 and 102.112, which state that the Boards “must” submit their returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the

election or face penalties. For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial manual recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by the deadline in sections 102.111 and 102.112, i.e., by 5:00 p.m. of the seventh day following the election.

B. The “Shall” and “May” Conflict

In addition to the conflict in the above statutes, sections 102.111 and 102.112 contain a dichotomy. Section 102.111, which sets forth general criteria governing the State Canvassing Commission, was enacted in 1951 as part of the Code and provides as follows:

102.111 Elections Canvassing Commission.—

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the seventh day

following an election, all missing counties shall be ignored,
and the results shown by the returns on file shall be
certified.

§ 102.111, Fla. Stat. (2000) (emphasis added).

The Legislature in 1989 revised chapter 102 to include section 102.112, which
provides that returns not received after a certain date “may” be ignored and that
members of the County Board “shall” be fined:

102.112 Deadline for submission of county returns
to the Department of State; penalties.—

(1) The county canvassing board or a majority
thereof shall file the county returns for the election of a
federal or state officer with the Department of State
immediately after the certification of the election results.
Returns must be filed by 5 p.m. on the 7th day following
the first primary and general election and by 3 p.m. on the
3rd day following the second primary. If the returns are
not received by the department by the time specified, such
returns may be ignored and the results on file at that time
may be certified by the department.

(2) The department shall fine each board member
\$200 for each day such returns are late, the fine to be paid
only from the board member’s personal funds. Such fines
shall be deposited into the Election Campaign Financing
Trust fund, created by s. 106.32.

(3) Members of the county canvassing board may
appeal such fines to the Florida Elections Commission,
which shall adopt rules for such appeals.

§ 102.112, Fla. Stat. (2000) (emphasis added).

The above statutes conflict. Whereas section 102.111 is mandatory, section

102.112 is permissive. While it is clear that the Boards must submit returns by 5 p.m. of the seventh day following the election or face penalties, the circumstances under which penalties may be assessed are unclear.

VII. LEGISLATIVE INTENT

Legislative intent—as always—is the polestar that guides a court’s inquiry into the provisions of the Florida Election Code.³⁹ Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code.⁴⁰ As noted above, however, chapter 102 is unclear concerning both the time limits for submitting the results of a manual recount and the penalties that may be assessed by the Secretary. In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent.⁴¹

First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute.⁴² In the present case, whereas section

³⁹ See, e.g., Florida Birth-Related Neurological Injury Compensation Ass’n v. Florida Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

⁴⁰ See, e.g., Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064 (Fla. 1995).

⁴¹ See, e.g., Capers v. State, 678 So. 2d 330 (Fla. 1996).

⁴² See, e.g., State ex rel. Johnson v. Vizzini, 227 So. 2d 205 (Fla. 1969).

102.111 in its title and text addresses the general makeup and duties of the Elections Canvassing Commission, the statute only tangentially addresses the penalty for returns filed after the statutory date, noting that such returns “shall” be ignored by the Department. Section 102.112, on the other hand, directly addresses in its title and text both the “deadline” for submitting returns and the “penalties” for submitting returns after a certain date; the statute expressly states that such returns “may” be ignored and that dilatory Board members “shall” be fined. Based on the precision of the title and text, section 102.112 constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing returns thereafter and section 102.111 constitutes a non-specific statute in this regard. The specific statute controls the non-specific statute.

Second, it also is well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.⁴³ In the present case, the provision in section 102.111 stating that the Department “shall” ignore returns was enacted in 1951 as part of the Code. On the other hand, the penalty provision in section 102.112 stating that the Department “may” ignore returns was enacted in 1989 as a revision to chapter 102. The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.

⁴³ See, e.g., McKendry v. State, 641 So. 2d 45 (Fla. 1994).

Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision.⁴⁴ In the present case, section 102.112 contains a detailed provision authorizing the assessment of fines against members of a dilatory County Canvassing Board. The fines are personal and substantial, i.e., \$200 for each day the returns are not received. If, as the Secretary asserts, the Department were required to ignore all returns received after the statutory date, the fine provision would be meaningless. For example, if a Board simply completed its count late and if the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines. But, on the other hand, if the returns submitted after the statutory date would not be ignored, the Board would have good reason to submit the returns and accept the fines. The fines thus serve as an alternative penalty and are applicable only if the Department may count the returns.

Fourth, related statutory provisions must be read as a cohesive whole.⁴⁵ As stated in Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992), "all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give effect to all statutory

⁴⁴ See, e.g., Amente v. Newman, 653 So. 2d 1030 (Fla. 1995).

⁴⁵ See, e.g., Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961).

provisions and construe related statutory provisions in harmony with another." In this regard we consider the provisions of section 102.166 and 102.168.

Section 102.166 states that a candidate, political committee, or political party may request a manual recount any time before the County Canvassing Board certifies the results to the Department and, if the initial manual recount indicates a significant error, the Board "shall" conduct a countywide manual recount in certain cases. Thus, if a protest is filed on the sixth day following an election and a full manual recount is required, the Board, through no fault of its own, will be unable to submit its returns to the Department by 5:00 p.m. on the seventh day following the election. In such a case, if the mandatory provision in section 102.111 were given effect, the votes of the county would be ignored for the simple reason that the Board was following the dictates of a different section of the Code. The Legislature could not have intended to penalize County Canvassing Boards for following the dictates of the Code.

And finally, when the Legislature enacted the Code in 1951, it envisioned that all votes cast during a particular election, including absentee ballots, would be submitted to the Department at one time and would be treated in a uniform fashion. Section 97.012(1) states that it is the Secretary's responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election

laws.” Chapter 101 provides that all votes, including absentee ballots, must be received by the Supervisor no later than 7 p.m. on the day of the election. Section 101.68(2)(d) expressly states that “[t]he votes on absentee ballots shall be included in the total vote of the county.” Chapter 102 requires that the Board submit the returns by 5 p.m. on the seventh day following the election.

The Legislature thus envisioned that when returns are submitted to the Department, the returns “shall” embrace all the votes in the county, including absentee ballots. This, of course, is not possible because our state statutory scheme has been superseded by federal law governing overseas voters;⁴⁶ overseas ballots must be counted if received no later than ten days following the election (i.e., the ballots do not have to be received by 7 p.m. of the day of the election, as provided by state law).⁴⁷ In light of the fact that overseas ballots cannot be counted

⁴⁶ According to the Secretary, this matter is governed by consent decree with the federal government.

⁴⁷ See Fla. Admin. Code R.1S-2.013 (1998), which provides in relevant part:

(7) With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election so long as such absentee ballot is otherwise proper. Overseas electors shall be informed by the supervisors of elections of the provisions of this rule, i.e., the ten day extension provision for the presidential preference primary and the general election, and the provision for voting for the

until after the seven day deadline has expired, the mandatory language in section 102.111 has been supplanted by the permissive language of section 102.112.

Further, although county returns must be received by 5 p.m. on the seventh day following an election, the "official results" that are to be compiled in order to certify the returns and declare who has been elected must be construed in pari materia with section 101.5614(8), which specifies that "write-in, absentee and manually counted results shall constitute the official return of the election."

(Emphasis added.)

Under this statutory scheme, the County Canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. The statutes make no provision for exceptions following a manual recount. If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

VIII. THE RIGHT TO VOTE

second primary.

The text of our Florida Constitution begins with a Declaration of Rights, a series of rights so basic that the founders accorded them a place of special privilege.⁴⁸ The Court long ago noted the venerable role the Declaration plays in our tripartite system of government in Florida:

It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights . . . have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of personal liberty and private property, "Thus far shalt thou come, but no farther."

State v. City of Stuart, 120 So. 335, 347 (Fla. 1929). Courts must attend with special vigilance whenever the Declaration of Rights is in issue.

The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished. The importance of this right was acknowledged by the authors of the Constitution, who placed it first in the Declaration. The very first words in the body of the constitution

⁴⁸ Traylor v. State, 596 So. 2d 957, 963 (Fla. 1992).

are as follows:

SECTION 1. Political power.—All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I., § 1, Fla. Const. (emphasis added). The framers thus began the constitution with a declaration that all political power inheres in the people and only they, the people, may decide how and when that power may be given up.⁴⁹

To the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no “unreasonable or unnecessary” restraints on the right of suffrage:

The declaration of rights expressly states that “all political power is inherent in the people.” Article I, Section 1, Florida Constitution. The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable [restraints on that right]. . . . Unreasonable or unnecessary restraints on the elective process are prohibited.

Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977) (emphasis added).⁵⁰

Because election laws are intended to facilitate the right of suffrage, such laws must

⁴⁹ See Talbot D’Alemberte, Commentary, 25A Fla. Stat. Ann., Art. I, § 1, Fla. Const. (West 1991).

⁵⁰ See also Pasco v. Heggen, 314 So. 2d 1, 3 (Fla. 1975) (“We have also stated that only unreasonable or unnecessary restraints on the elective process are prohibited.”).

be liberally construed in favor of the citizens' right to vote:

Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots It is the intention of the law to obtain an honest expression of the will or desire of the voter.

State ex rel. Carpenter v. Barber, 198 So. 49, 51 (Fla. 1940).⁵¹ Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy.⁵² Technical statutory requirements must not be exalted over the substance of this right.⁵³

Based on the foregoing, we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in

⁵¹ See also State ex rel. Whitley v. Rinehart, 192 So. 819, 823 (Fla. 1939) ("Election laws should be construed liberally in favor of the right to vote . . .").

⁵² See, e.g., State ex rel. Landis v. Dyer, 148 So. 201, 203 (Fla. 1933) ("The right to vote, though not inherent, is a constitutional right in this state. The Legislature may impose reasonable rules and regulations for its governance, but it cannot under the guise of such regulation unduly subvert or restrain this right.").

⁵³ See, e.g., Boardman v. Esteva, 323 So. 2d 259, 269 (Fla. 1975) ("In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected.").

this opinion. The clear import of the penalty provision of section 102.112 is to deter Boards from engaging in dilatory conduct contrary to statutory authority that results in the late certification of a county's returns. This deterrent purpose is achieved by the fines in section 102.112, which are substantial and personal and are levied on each member of a Board. The alternative penalty, i.e., ignoring the county's returns, punishes not the Board members themselves but rather the county's electors, for it in effect disenfranchises them.⁵⁴

Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process.⁵⁵ In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by the law. To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable,

⁵⁴ Cf. Boardman v. Esteva, 323 So. 2d 259, 268-69 (Fla. 1975) ("When the voters have done all that the statute has required them to do, they will not be disfranchised solely on the basis of the failure of the election officials to observe directory statutory instructions.").

⁵⁵ See 3 U.S.C. §§ 1-10 (1994).

unnecessary, and violates longstanding law.

Allowing the manual recounts to proceed in an expeditious manner, rather than imposing an arbitrary seven-day deadline, is consistent not only with the statutory scheme but with prior United States Supreme Court pronouncements:

Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. Despite the fact that a certificate of election may be issued to the leading candidate within 30 days after the election, the results are not final if a candidate's option to compel a recount is exercised. A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, s 4.

Roudebush v. Hartke, 405 U.S. 15, 25 (1972)(footnotes omitted).

In addition, an accurate vote count is one of the essential foundations of our democracy. The words of the Supreme Court of Illinois are particularly apt in this case:

The purpose of our election laws is to obtain a correct expression of the intent of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law. . . . The legislature authorized the use of electronic tabulating equipment to expedite the tabulating process and to eliminate the possibility of human error in the counting process, not to create a technical obstruction which defeats the rights of qualified voters. This court should not, under the appearance of enforcing the election laws, defeat the very object which those law are intended to achieve. To invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would

subordinate substance to form and promote the means at the expense of the end.

The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters should not be disfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such a failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.

Pullen v. Milligan, 561 N.E.2d 585, 611 (Ill. 1990)(citations omitted).

IX. THE PRESENT CASE

The trial court below properly concluded that the County Canvassing Boards are required to submit their returns to the Department by 5:00 p.m. of the seventh day following the election and that the Department is not required to ignore the amended returns but rather may count them. The court, however, erred in holding that the Secretary acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts. The Secretary's rationale for rejecting the Board's returns was as follows:

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will

of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged the possibility that the results of the manual recount could affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the possibility of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

Letter from Katherine Harris to Palm Beach Canvassing Board (Nov. 15, 2000)(emphasis added).

We conclude that, consistent with the Florida election scheme, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process. The Secretary in the present case has made no claim that either of these conditions apply at this point in time.

The above analysis is consistent with State ex rel. Chappell v. Martinez, 536 So. 2d 1007 (Fla. 1988), wherein the Court addressed a comparable recount issue.

There, the total votes cast for each of two candidates for a seat in the United State House of Representatives were separated by less than one-half of one percent; the county conducted a mandatory recount; the Board's certification of results was not received by the Department until two days after the deadline, although the Board had telephoned the results to the Department prior to the deadline; and the unsuccessful candidate sued to prevent the Department from counting the late votes. The Court concluded that the will of the electors supersedes any technical statutory requirements:

[T]he electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election. "There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain the statute has not been literally and absolutely complied with?"

Chappell, 536 So. 2d at 1008-09 (quoting Boardman v. Esteva, 323 So. 2d 259, 267 (Fla. 1975)).

X. CONCLUSION

According to the legislative intent evinced in the Florida Election Code, the

permissive language of section 102.112 supersedes the mandatory language of section 102.111. The statutory fines set forth in section 102.112 offer strong incentive to County Canvassing Boards to submit their returns in a timely fashion. However, when a Board certifies its returns after the seven-day period because the Board is acting in conformity with other provisions of the Code or with administrative rules or for other good cause, the Secretary may impose no fines. It is unlikely that the Legislature would have intended to punish a Board for complying with the dictates of the Code or some other law.

Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The

constitution eschews punishment by proxy.

As explained above, the Florida Election Code must be construed as a whole. Section 102.166 governs manual recounts and appears to conflict with sections 102.111 and 102.112, which set a seven day deadline by which County Boards must submit their returns. Further, section 102.111, which provides that the Secretary “shall” ignore late returns, conflicts with section 102.112, which provides that the Secretary “may” ignore late returns. In the present case, we have used traditional rules of statutory construction to resolve these ambiguities to the extent necessary to address the issues presented here. We decline to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it -- the Legislature.

Because of the unique circumstances and extraordinary importance of the present case, wherein the Florida Attorney General and the Florida Secretary of State have issued conflicting advisory opinions concerning the propriety of conducting manual recounts, and because of our reluctance to rewrite the Florida Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions

presented here.⁵⁶

Accordingly, in order to allow maximum time for contests pursuant to section 102.168, amended certifications must be filed with the Elections Canvassing Commission by 5 p.m. on Sunday, November 26, 2000 and the Secretary of State and the Elections Canvassing Commission shall accept any such amended certifications received by 5 p.m. on Sunday, November 26, 2000, provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof. If the office is not open for this special purpose on Sunday, November 26, 2000, then any amended certifications shall be accepted until 9 a.m. on Monday, November 27, 2000. The stay order entered on November 17, 2000, by this Court shall remain in effect until the expiration of the time for accepting amended certifications set forth in this opinion. The certificates made and signed by the Elections Canvassing Commission pursuant to section 102.121 shall include the amended returns accepted through the dates set forth in this opinion.

It is so ordered. No motion for rehearing will be allowed.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

⁵⁶At oral argument, we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request recounts in any additional counties. Neither candidate requested such an opportunity.

Three Cases Consolidated:

Case No. SC00-2346

Original Proceeding - Prohibition

Denise D. Dytrych, Palm Beach County Attorney, and James C. Mize, Jr., Andrew J. McMahon and Gordon Selfridge, Assistant Palm Beach County Attorneys, West Palm Beach, Florida; and Bruce Rogow and Beverly A. Pohl of Bruce S. Rogow, P.A., Fort Lauderdale, Florida,

for Petitioners

Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton, Gabriel E. Nieto, Elizabeth C. Daley, Arthur R. Lewis, Jr. and Elizabeth J. Maykut of Steel, Hector & Davis, LLP, Tallahassee, Florida, for the Elections Canvassing Commission; Robert A. Butterworth, Attorney General, pro se, Paul F. Hancock, Deputy Attorney General, and George Waas, Assistant Attorney General, Tallahassee, Florida, and Cecile Luttmner Dykas, Assistant Attorney General, Fort Lauderdale, Florida; and Terrell C. Madigan, Harold R. Mardenborough, Jr., Christopher Barkas and Matt Butler of McFarlain, Wiley, Cassedy & Jones, P.A., Tallahassee, Florida,

for Respondents

Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida; Michael A. Carvin of Cooper, Carvin & Rosenthal, PLLC, Washington, DC; Benjamin L. Ginsberg of Patton, Boggs, LLP, Washington, DC; Alex M. Azar II of Wiley, Rein & Fielding, Washington, DC; George J. Terwilliger, III and Timothy E. Flanigan of White & Case, LLP, Washington, DC; and R. Ted Cruz, Bush-Cheney Recount Committee, Austin, Texas,

for Honorable George W. Bush, Intervenor

Edward A. Dion, County Attorney for Broward County, Norman M. Ostrau, Deputy County Attorney, Andrew J. Meyers, Chief Appellate Counsel, and Tamara M. Scrudders and Jose Arrojo, Assistant County Attorneys, Fort Lauderdale, Florida; and Samuel S. Goren, James A. Cherof and Michael D. Cirullo of Josias, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, Florida,

for The Broward County Canvassing Board and Jane Carroll, as Broward County Supervisor of Elections, Intervenors

Case No. SC00-2348

Appeal of Judgment of Circuit Court, in and for Leon County, Terry P. Lewis, Judge, Case No. 00-2700 - Certified by the District Court of Appeal, First District, Case Nos. 1D00-4467/1D00-4501

Denise D. Dytrych, Palm Beach County Attorney, and James C. Mize, Jr., Andrew J. McMahon and Gordon Selfridge, Assistant Palm Beach County Attorneys, West Palm Beach, Florida; Bruce Rogow and Beverly A. Pohl of Bruce S. Rogow, P.A., Fort Lauderdale, Florida, for Canvassing Board for Palm Beach County; and W. Dexter Douglass of the Douglass Law Firm, Tallahassee, Florida; John D.C. Newton, II of Berger Davis & Singerman, Tallahassee, Florida; Mitchell W. Berger of Berger Davis & Singerman, Fort Lauderdale, Florida; David Boies of Boies, Schiller & Flexner, LLP, Armonk, New York; Karen Gievers, of Karen Gievers, P.A., Tallahassee, Florida; Lyn Utrecht and Eric Kleinfeld of Ryan, Phillips, Utrecht and MacKinnon, Washington, DC; Andrew J. Pincus and Ronald A. Klain, Washington, DC; and Laurence Tribe, Cambridge, Massachusetts, for Albert A. Gore, Jr. and Florida Democratic Party,

Appellants

Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton, Gabriel E. Nieto, Elizabeth C. Daley, Arthur R. Lewis, Jr. and Elizabeth J. Maykut

of Steel, Hector & Davis LLP, Tallahassee, Florida, for the Elections Canvassing Commission,

for Appellees

Case No. SC00-2349

Appeal of Judgment of Circuit Court, in and for Leon County, Terry P. Lewis, Judge, Case No. 00-2700 - Certified by the District Court of Appeal, First District, Case Nos. 1D00-4506

W. Dexter Douglass of the Douglass Law Firm, Tallahassee, Florida; John D.C. Newton, II of Berger Davis & Singerman, Tallahassee, Florida; Mitchell W. Berger of Berger Davis & Singerman, Fort Lauderdale, Florida; David Boies of Boies, Schiller & Flexner, LLP, Armonk, New York; Karen Gievers, of Karen Gievers, P.A., Tallahassee, Florida; Lyn Utrecht and Eric Kleinfeld of Ryan, Phillips, Utrecht and MacKinnon, Washington, DC; Andrew J. Pincus and Ronald A. Klain, Washington, DC; and Laurence Tribe, Cambridge, Massachusetts,

for Appellants

Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton, Gabriel E. Nieto, Elizabeth C. Daley, Arthur R. Lewis, Jr. and Elizabeth J. Maykut of Steel, Hector & Davis, LLP, Tallahassee, Florida, for the Elections Canvassing Commission,

for Appellees

December 4, 2000
Order on U.S. Supreme Court Remand

Supreme Court of Florida

MONDAY, DECEMBER 4, 2000

PALM BEACH COUNTY vs. **KATHERINE HARRIS, ETC., ET AL.**
CANVASSING BOARD, ET AL.
Case No. SC00-2346

VOLUSIA COUNTY vs. **KATHERINE HARRIS, ETC., ET AL.**
CANVASSING BOARD, ET AL.
Case No. SC00-2348
DCA Case Nos. 1D00-4467/1D00-4501
Circuit Court Case Nos. 00-2700/00-2717

FLORIDA DEMOCRATIC vs. **KATHERINE HARRIS, ETC., ET AL.**
PARTY
Case No. SC00-2349
DCA Case No. 1D00-4506
Circuit Court Case No. 00-2700/00-2717

Petitioners/Appellants

Respondents/Appellees

The Court will accept supplemental briefs from the parties through 3:00 p.m. on December 5, 2000, on the implementation of the Mandate to this Court from the United States Supreme Court. Briefs are to be no more than 20 pages.

Per this Court's Administrative Order In Re: Mandatory Submission of Briefs on Computer Diskette dated February 5, 1999, counsel are directed to include a copy of all briefs on a DOS formatted 3-1/2 inch diskette in Word Perfect 5.1 (or higher) format. **PLEASE LABEL ENVELOPE TO AVOID ERASURE.**

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy

TEST:

A handwritten signature in cursive script that reads "Thomas D. Hall".

Thomas D. Hall
Clerk, Supreme Court

tc

Served:

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DENISE D. DYTRYCH
ANDREW J. MCMAHON
JAMES C. MIZE, JR.
GORDON PHILLIP SELFRIDGE
DEBORAH K. KEARNEY
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HON. DAVE LANG, CLERK
HON. JON WHEELER, CLERK
HON. TERRY P. LEWIS, JUDGE
CECILE LUTTMER DYKAS
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HENRY B. HANDLER
MICHAEL D. CROTTY
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DOUGLAS A. DANIELS
MARK HERRON

December 4, 2000

**Appeal of Miami-Dade & Palm Beach Election Contest by Al Gore -
Dec. 4**

3000-2731

FILED
THOMAS D. HALL
DEC 04 2000
CLERK, SUPREME COURT
BY _____

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

December 4, 2000

CASE NO.: 1D00-4745

L.T. No. : 00-2808

Albert Gore, Jr. And
Joseph I. Lieberman

v.

Katherine Harris, As
Secretary Etc., Et Al.

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

It is hereby certified in accordance with Florida Rule of Appellate Procedure 9.125 that this appeal requires immediate resolution by the Supreme Court of Florida because the order on appeal presents issues which are of great public importance.

LAWRENCE, DAVIS and VAN NORTWICK, JJ., concur.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Mitchell Berger
Donna E. Blanton
Bruce S. Rogow
Joseph Klock
Ben Ginsburg
Hon. Dave Lang

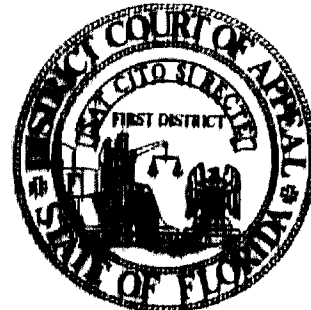
Craig Meyer
R. Frank Myers
Barry Richard
Andrew J. McMahon
Hon. N. Sanders Sauls

Terrell C. Madigan
Michael S. Mullin
Deborah K. Kearney
Tucker Ronzetti
Hon. Thomas D. Hall, Clerk

am



JON S. WHEELER, CLERK



IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

FILED
THOMAS D. HALL

DEC 04 2000

CLERK, SUPREME COURT
BY _____

Second Judicial Circuit
Case No. 00-2808

ALBERT GORE, Jr., Nominee of the
Democratic Party of the United States for
President of the United States, and
JOSEPH I. LIEBERMAN, Nominee of
the Democratic Party of the United States
for the Vice President of the United States,

Plaintiffs,

v.

KATHERINE HARRIS, as SECRETARY OF
STATE, STATE OF FLORIDA, ET AL,

Defendants.

First DCA Case

FILED
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JON S. WHELAN
CLERK DISTRICT COURT OF APPEAL
FIRST DISTRICT

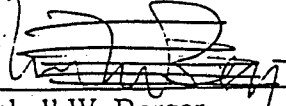
**APPELLANTS' SUGGESTION THAT DISTRICT COURT OF APPEAL
CERTIFY THE TRIAL COURT'S ORDER AS REQUIRING
IMMEDIATE RESOLUTION BY THE FLORIDA SUPREME COURT**

The Appellants, Al Gore and Joe Lieberman, pursuant to Article V, Section 3(b)(5) of the Florida Constitution and Rule 9.125 of the Florida Rules of Appellate Procedure, suggest that this Court certify to the Florida Supreme Court the trial court's Final Order.

The trial court's order resolves an unprecedented dispute about Florida's Presidential electoral process. Final resolution of that dispute will determine which Presidential candidate receives the majority of electoral votes. The Court is well familiar with many of the issues presented because it and the parties have been before it already in this litigation. The issues presented are matters of national importance. Time is extraordinarily short because of the schedule imposed by federal law. *Palm Beach County Canvassing Board v. Harris*, Nos. SC 00-2346 (Fla. November 21, 2000). The Florida Supreme Court must immediately and finally resolve the issues.

For all of these reasons, Plaintiffs suggest this Court certify the trial court's order as requiring immediate review by the Florida Supreme Court.

Respectfully submitted this 4 day of December 2000.


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(per Mark R. Steinberg)

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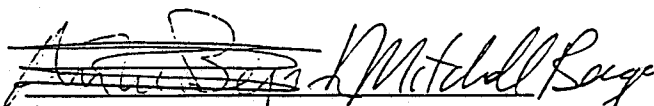
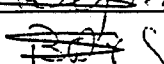
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Attorney  (per Mardenborough)
Stimley

00-4748

IN THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA, CIVIL DIVISION

ALBERT GORE, Jr., Nominee of the
Democratic Party of the United States for
President of the United States, and
JOSEPH I. LIEBERMAN, Nominee of
The Democratic Party of the United States
for the Vice President of the United States,

Plaintiffs,

v.

KATHERINE HARRIS, as SECRETARY OF
STATE, STATE OF FLORIDA, ET AL,

Defendants.

FILED
THOMAS D. HALL

DEC 04 2000

CLERK, SUPREME COURT
BY _____

CASE NO. 00-288

00 DEC -4 PM 4:58
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FILED
DAVE LANG
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA
JON S. WHEELER
CLERK DISTRICT COURT OF APPEAL
FIRST DISTRICT

PLAINTIFFS' NOTICE OF APPEAL

Plaintiffs, Albert Gore, Jr. and Joseph I. Lieberman, appeal to the First District Court of Appeal the order of this court rendered December, 4 2000. Florida Rule of Appellate Procedure 9.030(1) grants this court jurisdiction. A conformed copy of the order appealed is attached to this notice. The Order is a Final Order.

Respectfully submitted this 4 day of December 2000.

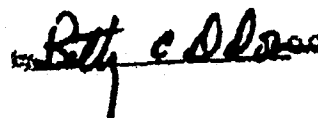

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STATE OF FLORIDA, COUNTY OF LEON
I HEREBY CERTIFY, that the above and foregoing
is a true and correct copy of original record intended
for the official records of Leon County, Florida.
WITNESS my hand and seal of office this 4 day
of Dec 2000.

DAVE LANG
Clerk of the Circuit Court





CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail, hand delivery or facsimile transmission this 4 day of December 2000 to the following:

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Attorney

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: CV 00-2808

ALBERT GORE, JR., Nominee of the
Democratic Party of the United States for
President of the United States, and
JOSEPH I. LIEBERMAN, Nominee of
the Democratic Party of the United States
for Vice President of the United States,

Plaintiffs,

v.

KATHERINE HARRIS, as SECRETARY OF
STATE, STATE OF FLORIDA, ET AL.,

Defendants.

FILED
THOMAS D. HALL

DEC 04 2000

CLERK, SUPREME COURT
BY _____

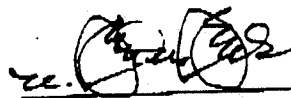
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DAVE LANG
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

FINAL JUDGMENT

This action was tried before the court. The findings and conclusions in the ruling of the court from the bench in open court this day shall become a part hereof. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiffs Albert Gore, Jr. and Joseph I. Lieberman shall take nothing by the action and the Defendants may go hence without day.

DONE AND ORDERED in Chambers this 4th day December, 2000.



N. SANDERS SAULS
CIRCUIT JUDGE

Copies furnished to:

See attached service list

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December 5, 2000

Supplemental Brief of Gov. George W. Bush

SUPREME COURT OF FLORIDA

PALM BEACH COUNTY
CANVASSING BOARD, et al.
etc., et al.

vs. KATHERINE HARRIS,

Case No. SC00-2346

VOLUSIA COUNTY
CANVASSING BOARD, et al.
etc., et al.

vs. KATHERINE HARRIS,

Case No. SC00-2348
DCA Case Nos. 1D00-4467/1D00-4501
Circuit Court Case Nos. 00-2700/00-2717

FLORIDA DEMOCRATIC
PARTY
al.

vs. KATHERINE HARRIS, etc., et

Case No. SC00-2349
DCA Case No. 1D00-4506
Circuit Court Case No. 00-2700/00-2717

Petitioners/Appellants

Respondents/Appellees

SUPPLEMENTAL BRIEF OF GEORGE W. BUSH

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McPherson v. Blacker, 146 U.S. 1 (1892)† † † † † † † † † † 6, 15, 16

Minnesota v. National Tea Co., 309 U.S. 551 (1940)†††††††.††.8

Pasco v. Heggen, 314 So. 2d 1 (Fla. 1975)† † † † † † † † † † † ..10, 11

Pullen v. Mulligan, 138 Ill. 2d 21 (1990)† † † † † † † † † † † .12, 13

Roudebush v. Hartke, 405 U.S. 15 (1972)† † † † † † † † † † † † ..12

State v. City of Stuart, 120 So. 335 (Fla. 1929)† † † † † † † † † † † ...10

Treiman v. Malmquist, 342 So. 2d 972 (Fla. 1977)† † † † † † .10, 11, 12

Constitutions, Statutes, Codes

Article II, United States Constitution† † † † † † † † † † † † † 2, 8,
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Article II, ⁻1, United States Constitution † † † † † † † † † † † † † ..2,
3,

Article II, ⁻1, cl. 2, United States Constitution† † † † † † † † † † † .6,
15

3 U.S. Code ⁻5† † † † † † † † † † † † † † † † † † † .2, 3, 5, 7, 8, 15

Article I, ⁻1, Florida Constitution††††† ††††††††††††††††..9

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STATEMENT OF THE CASE AND FACTS

On December 4, 2000, a unanimous decision of the Supreme Court of the United States (the ~Supreme Court™) vacated this Court's November 21 judgment in this case and remanded it for reconsideration by this Court in light of the Supreme Court's opinion. Following that ruling, this Court requested supplemental briefs addressing ~the implementation of the Mandate to this Court from the Supreme Court of the United States.™ Intervenor/Respondent Governor George W. Bush respectfully submits that, in light of the Supreme Court's opinion, this Court should affirm the judgment of the Circuit Court of Leon County from which this appeal was originally taken.

This Court also has before it another appeal from the Leon County Circuit Court, dismissing on multiple grounds the contest action filed by Vice President Gore. Respondent respectfully suggests that sensible resolution of these two separate cases can proceed as follows:

If this Court chooses to address the contest appeal on the merits rather than either dismissing the appeal or summarily affirming the Circuit Court's decision in the contest action, the Court must *first* resolve important issues of federal law raised on this remand. The resolution of issues to be decided upon remand from the Supreme Court is necessary to adjudicating claims in the contest action, and any possible relief that this Court might order after its review of the contest appeal depends upon those antecedent

legal questions. To do otherwise reverses both the logic and the reality of the present procedural posture of these matters. The contest appeal necessarily involves important Federal constitutional and legal issues, as well as questions of Florida statutory law, and the issue of whether the trial court's findings of fact are clearly erroneous. In order to reach these numerous difficult issues, appropriate deference to the Supreme Court and the efficient use of scarce judicial resources both require resolving the remand case first.

In particular, this Court would be forced to consider issues including, but not limited to, whether, in light of Article II, Section 1 of the U.S. Constitution and 3 U.S.C. § 5:

- the deadline for certification of county returns › which served as the predicate for the contest proceeding › could be ~equitably™ extended to November 26;
- a new standard of counting ~dimpled™ ballots › despite a written preexisting policy in Palm Beach explicitly prohibiting counting such ballots as votes and a lack of any other Florida precedent for doing so › would be permissible;
- a new procedure for limited recounts in selected counties › despite the complete absence of precedents for such recounts › can be applied in the context of a statewide election for presidential electors; and
- the established discretion accorded county canvassing boards under Florida election law could be supplanted.

Respondent respectfully submits that any affirmative answer to the aforelisted questions would necessarily come into irreconcilable conflict with 3 U.S.C. § 5 and Article II, Section 1 of the U.S. Constitution, and could ultimately jeopardize the ability of Florida's electors to participate conclusively in the 2000 presidential election.

On the other hand, if this Court declines to hear that contest hearing appeal, or if it affirms that decision on the merits, then this remanded case may well become moot. Yesterday, after extensive hearings, expert testimony, presentation of evidence, and legal argument, the Circuit Court for Leon County rejected Vice President Gore's contest of the 2000 presidential election. In so doing, the Circuit Court carefully reviewed each of Vice President Gore's claims and concluded, *inter alia*, that the evidence was insufficient to meet the legal burden, that Vice President Gore's witnesses were not credible, and that the county canvassing boards did not abuse their sound and duly conferred discretion in resolving the issues in this election.

Respondent believes that this well-reasoned and careful determination by the Circuit Court was correct, and that this Court should either deny the appeal or affirm the result summarily. In that instance, the disputes over whether the appropriate date for certification was November 18 or November 26 and whether Florida statutes in effect on November 7, 2000 permit "dimples" to be counted as votes become academic: either way, the same electors are certified with the exact same result.

Thus, if the contest appeal is affirmed, judicial economy will be served and this Court will avoid the complex federal and constitutional issues implicated in this remanded case. And, of course, the period of uncertainty and instability regarding Florida's participation in the presidential election will be brought to an end and final resolution will be achieved for the 2000 presidential election.

SUMMARY OF ARGUMENT

The opinion of the Supreme Court of the United States directs this Court on remand to specify the extent to which this Court's November 21 opinion in this case relied on Florida Constitution and the extent to which its opinion considered the effects of its ruling under 3 U.S.C. § 5. The November 21 opinion was based ultimately on considerations arising under the Florida Constitution. Moreover, the effects of the November 21 decision under 3 U.S.C. § 5 are not addressed in the Court decision. Finally, without the overlay of the Florida Constitution, this Court must construe the plain language of sections 102.111 and 102.112 to require county canvassing boards to submit returns by the seventh day following the election and to permit the Secretary of State discretion to ignore any late filed returns.

ARGUMENT

I. The Mandate Of The Supreme Court of The United States.

The December 4, 2000 order of the Supreme Court vacated this Court's November 21, 2000 judgment and remanded for further proceedings

with respect to two distinct questions of federal law: (1) whether this Court's November 21 ruling changed Florida election law in violation of Article II of the United States Constitution, and (2) whether this Court understood that such a change would frustrate the "legislative wish" of the Florida Legislature embodied in the Florida Election Code, in light of 3 U.S.C. § 5 and Article II. **U.S. Slip Op.** at 6-7.

The Supreme Court recognized that this Court's opinion "relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution in concluding that late manual recounts could be rejected only under limited circumstances." *Id.* at 4. As the Supreme Court noted, although as a general rule it "defers to a state court's interpretation of a state statute," this case is outside that rule because it concerns a law governing the selection of Presidential electors. ~~Slip Op. at 4.~~ *Id.* Here, "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Id.* Invoking its decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), the Supreme Court made explicit that Article II authorizes states to appoint electors only "in such Manner as the Legislature thereof may direct" and thus the federal constitution "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" of the State **U.S. Slip Op.** at 5 (quoting *McPherson*, 146 U.S. at 25). In particular, as the Supreme Court also made clear in *McPherson*, "[t]his power is conferred upon the legislatures of the

States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutionsTM146 U.S. at 34 (quoting Senate Rep. 1st Sess., 43 Cong. No. 395)).

Having indicated that this Court has no ability to ~circumscribeTM the legislative power with respect to the appointment of electors on the basis of any provision of the Florida Constitution, the Supreme Court identified several passages in this Court’s November 21 opinion that demonstrate that this Court relied on the Florida Constitution to ~circumscribeTM the legislature’s power in extending the statutory deadline for a return of ballot counts. *See* **U.S.** Slip Op. at 5.

The Supreme Court also addressed 3 U.S.C. § 5, explaining that under this provision, ~[i]f the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to [the] time of meeting of the electors.TM **U.S.** Slip Op. at 6. As the Court explained, § 5 ~contains a principle of federal law that would assure finality of the State’s determination,TM but only ~if made pursuant to a state law in effect before the election.TM *Id.* Given this important provision > which not only provides a ~safe harborTM but also implements Article II > the Supreme Court directed this Court to construe the state Election Code with § 5 in mind, and, significantly, cautioned against overriding the ~wishTM of the Florida legislature to secure for Floridians the benefits of that federal statute. **U.S.** Slip Op. at 6 (~a legislative wish to take advantage of the –safe

harbor—would counsel against any construction of the Election Code that Congress might deem to be a change in the lawTM).

Finally, the Supreme Court stated that in light of the ~considerable uncertaintyTM surrounding this Court’s November 21 decision, it was unable ~at this timeTM to review the arguments that Intervenor/Respondent Bush urged under Article II and 3 U.S.C. ~ 5. **U.S.** Slip Op. at 6. The Supreme Court accordingly directed this Court to reconsider its decision in light of those provisions of federal law. In this way, ~ambiguous or obscure adjudications by state courts [will] not stand as barriers to a determination *by this Court* of the validity under the federal constitution of state action.TM **U.S.** Slip Op. at 6 (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940)) (emphasis added).

II. This Court’s Initial Interpretation Of Florida Election Laws In This Case Was Based On the Florida Constitution Rather Than On the Statutory Scheme Created By The Florida Pursuant To Its “Direct Grant” Of Authority Under Article II, Section 1 of the Federal Constitution.

It is clear that this Court’s original ruling was based not on a simple construction of Florida’s election law statute, but rather, on its view of the right to vote, and the rights emanating therefrom, contained in Florida’s Constitution and other law external to the election code.

This Court’s reliance upon the constitutional right to vote was evident at the very outset of its opinion. Thus, under the section title ~Guiding Principles,TM the Court disparaged ~hyper-technical reliance upon *statutory* provisions.TM Fla. Slip Op. at 10 (emphasis added). Instead, the Court

emphasized that ~ *–The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.*—TM*Id.* at 11 (quoting *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975) (emphasis in the original)). It explained that it had ~consistently . . . adhered to the principle that the will of the people is the paramount considerationTM and that its ~goal today remains the same as it was a quarter of a century ago, *i.e.*, to reach the result that reflect the will of the voters, whatever that might be.TM *Id.* at 11. The Court, moreover, made clear that this ~principleTM was in addition to and separate from Florida’s election law statutes: ~This fundamental principle, *and* our traditional rules of statutory construction, guide our decision today.TM *Id.* (emphasis added). And in identifying ~The Applicable LawTM to resolving the question before it, the first thing that this Court referenced, which it described as ~[t]he abiding principle governing all election law in Florida,TM was Article I, Section 1, of the Florida Constitution. *See Fla. Slip Op.* at 16.

Indeed, after noting the clarity of Florida’s statutes, this Court could not have been clearer that resolution of the question before it ~requiredTM to examine the ~interplayTM of those statutes with ~constitutional law.TM *Fla. Slip Op.* at 31. This Court plainly acknowledged that ~[u]nder this statutory scheme, the County Canvassing Boards are *required* to submit their returns to the Department by 5 p.m. of the seventh day following the electionTM; that ~[t]he statutes *make no provision for exceptions* following a manual recountTM; and that ~[i]f a Board fails to meet the deadline, the Secretary is

not required to ignore the county’s returns but rather is *permitted to ignore the returns.*” *Id.* at 31 (emphasis added). It then explicitly stated that in order “[t]o determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, *it is necessary to examine the interplay between our statutory and constitutional law*”*Id.* (emphasis added).

The Court then immediately turned, in Part VIII of its opinion, to “THE RIGHT TO VOTE.”*Id.* (emphasis in the original). It then proceeded to analyze Florida constitutional law regarding this right. It thus began with “[t]he text of [the] Florida Constitution” and, in particular, the “Declaration of Rights.”*Id.* It proceeded to cite a series of constitutional law decisions. *See, e.g.,* Fla. Slip Op. at 32 (quoting *State v. City of Stuart*, 120 So. 335, 347 (Fla. 1929)); *id.* at 33 (quoting *Treiman v. Malmquist*, 342 So.2d 972, 975 (Fla. 1977)); *id.* at 33, n. 50 (citing *Pasco v. Heggen*, 314 So. 2d 1, 3 (Fla. 1975)). It referenced the “framers” of the constitution and, in particular, their “declaration [in the Constitution] that all political power inheres in the people.”*Id.* at 32. Perhaps most specifically, the opinion held that “[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are *valid* only if they impose no “unreasonable or unnecessary—restraints *on the right of suffrage.*”*Id.* at 33 (emphasis added). Quoting *Treiman*, 342 So.2d at 975, the Court stated that “[u]nreasonable or unnecessary restraints on the elective process are prohibited.”*Id.* (emphasis in original). As the Court explained, “[t]echnical

statutory requirements must not be exalted over the substance of this right.TM *Id.* at 34 (**emphasis added**). Needless to say, ~statutory requirementsTM are ~exaltedTM over everything except the requirements of higher law; **law**, *i.e.*, the Florida Constitution.

Immediately after this discussion, this Court set forth its explicit holding. ~*Based on the foregoing*,TM explained the Court, ~we conclude that the authority of the Florida Secretary of State to ignore amended returns . . . may be lawfully exercised under limited circumstances.TM *Id.* at 34 (**emphasis added**). The Court then prescribed those circumstances, which are not found in the statute itself:

Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by law. To disenfranchise electors in an effort to deter Board members, as the Secretary in this case proposes, violates longstanding law.

Id. at 35. Thus, after emphasizing that ~unreasonable or unnecessaryTM statutory requirements for elections violate the Florida Constitution, the Court struck down the Secretary's adherence to the statutory deadline because it was such an ~unreasonable and unnecessaryTM restriction, under the ~longstandingTM precedent interpreting the Constitution. *See also id.* at 40 (~[t]his drastic penalty [of ignoring late-filed manual recounts] must be both reasonable and necessary.TM This Court's reliance on *Roudebush v.*

Hartke, 405 U.S. 15, 25 (1972) and *Pullen v. Mulligan*, 138 Ill.2d 21 (1990),¹ neither of which are based on Florida law, further confirms that this Court's decision rested on principles external to the election law statute itself. *See id.* at 35-36.

That this Court relied on principles outside the statute itself to extend the statutory deadline is evident by a comparison to the other statutory analyses in the opinion. The Court, for example, in the course of interpreting the phrase "error in vote tabulation" in section 103.166(5), engaged in a detailed statutory analysis, reconciling the various terms in the

¹ In its initial opinion, the Court relied in part on Petitioner's representations concerning the Illinois Supreme Court case of *Pullen v. Mulligan*. The Court quoted *Pullen* for the proposition that, where the intention of the voter can be ascertained with reasonable certainty from the ballot, that intention should be given effect. This case does not stand for the proposition as the petitioner has suggested, however, that all dimpled ballots should be counted as votes. The Supreme Court of Illinois found that the procedures adopted by the trial court were proper and that 19 out of the 27 votes in question were **disregarded** entirely because the intent of the voter could not reasonably be ascertained. These 19 votes had dimpled or other marks. The 8 votes that were counted were **perforated, not dimpled** ballots, or ballots that contained dimples consistently throughout the ballot. *Pullen* does not stand for the proposition that "rogue dimples" or other dimples can be counted, unless the voter cast dimple ballots consistently throughout the punchcard and no other chads were successfully punched.

We also note that Michael Lavelle, the attorney representing Penny Pullen in this case, provided an affidavit to the Circuit Court in Palm Beach County on November 22, 2000 that falsely stated that dimpled ballots were counted in the *Pullen* case. Mr. Lavelle later corrected his false affidavit. In the transcript of the deposition of Mr. Lavelle on December 1, 2000 in *Gore v. Katherine Harris*, before the Leon County Circuit Court, No. 00-2808, Mr. Lavelle stated that when he had pages of the transcript from the trial court read to him, and was advised that no dimples or dents were counted, he said, "my God, I can't believe it."

statute—s text to produce a cohesive whole. *See* Fla. Slip Op. at 14-16. Likewise, in interpreting the “shall ignore” provision in section 102.111 and the “may ignore” provision of section 102.112, the Court resorted to the traditional canons that “[t]he specific statute controls the non-specific statute,” the more recently enacted statute controls the older statute, and that a statutory provision “will not be construed in such a way that it renders meaningless or absurd any other statutory provision.” *Id.* at 26-27.

In contrast, with respect to reconciling the Secretary’s authority to ignore late-filed returns in sections 102.111 and 102.112 with the manual recount provisions of 102.166, the Court did not rest its decision on the statute itself. Rather, it relied on principles external to the statute itself. *See* Fla. Slip Op. at 23. That is, to fill in these perceived statutory ambiguities, the Court did not defer to the judgment of the Secretary, as is required under ordinary principles of administrative laws. *See Greyhound Lines, Inc. v. Yarborough*, 275 So.2d 7, 3 (Fla. 1973). Rather, it resolved the ambiguity by looking to the principle of Florida constitutional law that the will of the people must prevail. The Court thus found it necessary to “invoke the equitable powers . . . to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here.” *Id.* at 41 (emphasis added).²

² To be sure, the Court’s opinion does state that it has “used traditional rules of statutory construction” to resolve statutory ambiguities. Fla. Slip Op. at 40. Presumably, the “traditional rule” referenced is that an ambiguous statute should be interpreted to avoid raising constitutional doubt. That rule itself, however, references principles external to the

Finally, Part X of this Court’s opinion made explicit the centrality of the Florida Constitution to its analysis: “Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county’s returns filed after the initial statutory date are limited.”TM Fla. Slip Op. at 38. Thus, as the Supreme Court noted, this Court decided that Florida’s constitutional right to vote trumped the careful balance struck by the Florida Legislature in favor of prompt finality, as expressed in Florida law. This Court set aside the statutory certification procedures in favor of new rules that it regarded as more faithful to the state constitution. The conclusion that this Court elevated the supremacy of the Florida Constitution over the legislature’s plain statutory directive is inescapable. Indeed, as discussed in Part III below, this Court could have reached its decision *only* by this *constitutional* graft on the statutory scheme.

This Court’s reliance upon the Florida Constitution, however, violates Article II.³ As the Supreme Court made clear in *McPherson v. Blacker*, Article II, § 1, cl. 2 of the United States Constitution entrusts state legislatures with “plenary power”TM over the manner in which to appoint presidential electors. The *McPherson* Court quoted at length with approval

statute.

³Because 3 U.S.C. § 5, among other things, implements Article II, this Court’s reliance upon the Florida Constitution would also fail to meet the requirements of § 5.

from an 1874 Senate Report that reflected an understanding of state legislatures—power to provide for the manner of appointing presidential electors without constraint from state constitutions. “This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their *state constitutions*”TM*McPherson*, 146 U.S. at 35 (quoting Sen. Rep. 1st Sess. 43d Cong. No. 395).

The Supreme Court’s decision, with its emphasis on *McPherson*, must be read as an express caution to this Court. Quite simply, invocation of state constitutional provisions in order to “circumscribe”TM legislative directives concerning the manner in which to appoint presidential electors is constitutionally impermissible. *See* U.S. Slip Op. at 5 (quoting *McPherson*, 146 U.S. at 25). Thus, this Court must interpret the Florida election laws at issue in this case, in the context of a presidential election, consistent with Article II (*i.e.*, without reliance on the Florida Constitution).

This Court, in order to implement the Supreme Court’s mandate faithfully, must revisit its decision and interpret the legislature’s statutory scheme without reference to the Florida Constitution. As discussed in Part III, below, without reference to the Florida Constitution, the statutory scheme plainly granted the Secretary of State the discretion to refuse to certify returns that were not submitted before 5 p.m. on the seventh day after the election. Accordingly, the appropriate course of action for this Court on remand is to affirm the judgment of the Leon County Circuit Court.

III. Absent the State Constitutional Concerns Relied On By This Court In Its Original Ruling, The Statute Must Be Read To Permit The Secretary of State To Reject Late Filed Returns.

Without the overlay of the Florida Constitution, the Court's prior interpretation of the statute must be replaced with a reading that upholds the Secretary of State's actions in this case. The Florida election code expressly states, in the plainest possible language, that county canvassing boards—election returns ~must be filed by 5:00 p.m. on the seventh day following the . . . general election . . .TMand that the Secretary ~shallTMor ~mayTMignore any returns filed in violation of this mandatory state law obligation. Fla. Stat. — 102.111-102.112.

This Court's original opinion construed these provisions to require that election returns from a manual recount may be filed at any time that would not ~preclude a candidate from contesting the certificationTMand that the Secretary may not ignore returns filed after the statutory deadline, but within this new judicially-created ~deadline.TMSlip Op. at 38, 40. In other words, the Court read the requirements that the returns ~shallTMbe submitted by the statutory deadline and that the Secretary of State ~shallTMor ~mayTMignore any late-filed returns to mean that the returns ~couldTMbe filed late and that the Secretary of State ~must acceptTM such returns.

While the county canvassing boards are expressly required to submit all election returns within seven days, there is no statutory requirement that the boards conduct manual recounts and no implicit or explicit exception to the seven-day deadline for manual recounts, even though all agree that the

Florida legislature expressly contemplated manual recounts and knew they would be time consuming. To the contrary, the time for requesting a recount is left to the discretion of the losing candidate and the decision whether to conduct a recount is left to the discretion of the county canvassing board. Thus, under the *statute*, far from being a mandatory or essential means of tallying votes in close elections, manual recounts are simply a *conditional option* left to the discretion of canvassing boards › they may conduct them if, and only if, they do so within the unambiguous mandatory deadline. If it is difficult for a large county to do so because it has many votes to count, it must either forego the manual recount or ~*shall* appoint as many counting teams . . . as is necessary™to get the job done within seven days. Section 102.166(7)(a). (After all, large counties with more voters also have more resources, personnel and money to do the counting.) Alternatively, if, as this Court—s original opinion hypothesized, a manual recount is not even requested by the losing candidate until the eve of the deadline, this unreasonably dilatory request would, standing alone, be a compelling reason for the Board to deny the manual recount request. *See* Slip Op. at 23. Thus, the fact that a ~candidate *can* request a manual recount at any point prior to certification by the board and such action *can* lead to a full recount™in no way alters or relaxes the requirement that they ~must™ do so within seven days. Slip Op. at 23 (emphasis added).

This is particularly true because the Florida Legislature expressly contemplated the possibility of potentially time-consuming manual recounts

when it re-enacted, and reinforced, the mandatory seven-day deadline. In 1989, when it *first* authorized manual recounts, the legislature knew that this would be the only method for recounting votes that might push up against the statutory deadline. It nonetheless subjected this novel methodology to the same deadline as all other methods of recounting votes and provided explicit directions for resolving the potential time crunch caused by manual recounts › appointing enough counting teams. Indeed, Section 112 and the revision of Section 166 were signed into law on the *same day* in 1989. Ch. 89-338, 89-348, Laws of Fla. We therefore know to a certainty that the legislature intended that manual recounts, like all other means of resolving election protests, be subject to the uniform, unambiguous deadline. Even if the Secretary has authority to “ignore”TM late-filed returns in circumstances other than where there has been substantial compliance with the deadline, it certainly cannot be in the manual recount circumstance expressly contemplated, and not excused, by the Florida legislature.

Moreover, the fact that the Florida Legislature expressly contemplated manual recounts conclusively demonstrates that the legislature did not believe manual recounts were the best or only means of accurately counting votes, or believed that any improved accuracy was less important than the finality and uniformity created by the mandatory deadline. If the Legislature thought that manual recounts were the best means of achieving an accurate vote tally, it would not have made that

methodology wholly optional by each county board and thereby created a system where such returns would necessarily be performed only in *part* of the state. If a legislature believes a particular methodology is the best means for assessing the number of legal votes, and is seeking to achieve statewide accuracy, it obviously would make that method mandatory and statewide – as the Florida legislature did for the automatic statewide *machine* recount. See Fla. Stat. – 102.166. Even if vote tallies are perfect in the counties where the Vice President seeks manual recounts, we still will not know which candidate received the most legally cast votes because the other counties in Florida did not engage in these sorts of recounts. The Florida legislature’s knowledge of this arithmetic reality demonstrates that it did not take a position as to whether machine or manual recounts were more accurate and was perfectly content to have certified statewide returns based exclusively on the machine recounts, or a combination of machine and manual recounts. Moreover, if the Florida legislature thought the manual recounts were the only permissible means of devising accurate election returns, and also thought it would be sometimes impossible to do so within seven days, it would not personally *fine* county board members who were simply seeking to vindicate this fundamental right to vote.TM

⁴In its initial brief in this case, the Florida Democratic Party suggested that there is somehow a conflict between the requirement that the official results compiled by the county canvassing boards for submission to the Secretary include write-in, absentee and manually recounted resultsTM and the requirement that the board submit manual recount results within seven days. See Section 101.5614(a). This assertion is facially incorrect. It is quite true that manually recounted results,TM like write-inTM votes, are a

For these reasons, any conclusion that the ~right to vote,TM or an accurate vote count, is somehow dependent on manual recounts (in selected counties) is necessarily premised on empirical and policy judgments that plainly cannot be derived from the Florida *election code*. Rather, as this Court's original opinion candidly acknowledged, the primacy given to manual recounts is derived from the Florida Constitution, as previously interpreted by this Court and Illinois Supreme Court ~pronouncementsTM on ~accurate vote counts [being] one of the essential foundations of our democracy.TM Slip Op. at 36.

proper part of the official results *if* they are done within the seven-day window › as Volusia County did. This simply reaffirms that the Florida legislature contemplated that manual recounts, along with other means of supplementing the returns provided by ~the automatic tabulating equipment,TM be included in the canvassing boards—election returns. It in no way suggests that a board's desire to manually recount votes would somehow excuse noncompliance with the seven day deadline, any more than its desire to count ~write-in votesTM would excuse noncompliance. This is particularly obvious because Section 5614 is a directive to the *county canvassing boards* concerning what should be in their official returns and has nothing to do with the Secretary's duty to certify the returns when submitted. In Section 111, this certification, and declaration of a winner, must be done ~as soon asTM the Commission receives the county boards—certified returns. The statute does not contemplate two certifications and two declarations of which candidate won › one based on returns without manual recounts and another when supplemented by the manual recounts.

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I hereby certify that the font in this brief is Times New Roman 14 point and is in compliance with Florida Rules of Appellate Procedure.

Jason L. Unger

December 5, 2000

Supplemental Brief of Vice President Al Gore

SUPREME COURT OF FLORIDA

CASE NOS.: SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY
CANVASSING BOARD

vs. KATHERINE HARRIS, ETC.,
ET AL.,

VOLUSIA COUNTY
CANVASSING BOARD

vs. MICHAEL MCDERMOTT,
ET AL.,

FLORIDA DEMOCRATIC PARTY

vs. MICHAEL MCDERMOTT,
ET AL.

Petitioners/Appellants

Respondents/Appellees

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INTRODUCTION The United States Supreme Court has issued a decision declining to review the federal questions asserted to be presented in this case, vacating this Court's prior judgment, and remanding for clarification on two specific points. In doing so, it applied the same procedures followed in *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940). On remand in that case, the Minnesota Supreme Court properly decided to "examine anew the issues we thought had been determined in our prior opinion Having so re-examined them, we conclude that our prior decision was right," whereupon that court reinstated the judgments that the U.S. Supreme Court had vacated. *National Tea Co. v. State*, 294 N.W. 230, 231 (Minn. 1940).

The same resolution is justified here. Notwithstanding respondents' overwrought claims to the contrary, this Court's prior decision was correct, and relied on traditional canons of statutory construction and established principles for reviewing whether an official has abused her discretion. This Court should enter an Order clarifying its decision in this respect. In addition, it should clarify that its ruling did not trigger the concerns of 3 U.S.C. §5, because it did not "change the rules of the game" when it interpreted and applied Florida statutes. To the contrary, this Court's decision was (as the Court noted) compelled by settled Florida law.

Moreover, while any *other* result would have raised a concern under 3 U.S.C. §5, the actual result here did not. (In fact, this Court's decision was

expressly intended to maintain Florida's ability to comply with the timeline established for utilizing the "safe harbor" provided by federal law.) Once having addressed these points, this Court should reinstate the judgment vacated by the U.S. Supreme Court in this case. *See, e.g., National Tea Co., supra*, at 231 (reinstating the vacated judgments), *on remand from Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

STATEMENT OF THE CASE AND FACTS

The United States Supreme Court has remanded this case for clarification of the basis of the decision and the relief ordered by this Court in *Palm Beach County Canvassing Board v. Harris*, Florida Supreme Court Case Nos. SC00-2346, SC00-2348 and SC00-2349 (Nov 21, 2000). The U.S. Supreme Court's Per Curiam Opinion concluded:

Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, §1, cl.2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. §5. The judgment of the Supreme Court of Florida is therefore vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Bush v. Palm Beach County Canvassing Board, No. 00-836, at 7 (December 4, 2000).

SUMMARY OF ARGUMENT

Providing the requested clarification is a straightforward matter. This Court did not rely dispositively upon the Florida Constitution when reconciling the conflicting provisions of Sections 102.111, 102.112 and 102.166 of the State’s Election Code. Instead, it issued an opinion applying traditional canons of statutory construction governing interpretation of Florida statutes – nothing more, nothing less.

The Court’s ruling on the limits of a state governmental official’s discretion interpreting and applying state law within the limits set by the Florida legislature was also unexceptional. The Court resolved the issue of whether a member of this State’s Executive Branch had abused her authority in a manner and using decisional rules that would be unremarkable in a different context.

Most importantly, this Court did not – as the U.S. Supreme Court worried – rely upon the Florida Constitution to circumscribe the Legislature’s authority to establish a method for the selection of electors, under the U.S. Constitution. This Court’s discussion of the Florida Constitution merely confirmed that its statutory interpretation was consistent with the principles of that Constitution. In no way was the Legislature’s power under Article II of the U.S. Constitution constrained by application of the Florida Constitution here; far from thwarting the Legislature’s statutory design, all that this Court did was play its traditional part in implementing that design.

Moreover, nothing in this Court’s opinion put Florida in jeopardy of losing the “safe harbor” of 3 U.S.C. §5. Thus, the Court’s decision, which only applied “the

rules of the game,” was not any sort of “change” in those rules “after the fact.”

As a result, this Court should clarify its earlier decision; make it plain that that decision rested on Florida’s statutes and case law; and reinstate its judgment in favor of petitioners.

ARGUMENT

A. This Court Employed Only Traditional Canons of Statutory Interpretation in Reconciling Conflicting State Statutes

The Court’s opinion first held that the plain language of section 102.166(5) authorized local canvassing boards to conduct manual recounts of ballots. *Harris* at pp. 14. This Court then took on the difficult task of reconciling several statutes that did not neatly mesh. In doing so, this Court applied long established principles of statutory construction to reconcile facially conflicting statutory provisions, in order to give maximum effect to each, and to honor the Legislature’s intent. First, this Court was faced with two statutes, one saying “shall” and a later one saying “may.”¹ *Harris, supra*, at 22-24, 27-29. Second, this Court was faced with a recently

¹ During the trial court’s hearing, the Secretary of State conceded that section 102.112, Florida Statutes, “is a later expression of the legislature, it, in effect has repealed the earlier statute [102.111, Florida Statutes].” *McDermott et al. v. Harris, et al.*, Case No. 00-2700 (Fla. 2nd Jud. Cir. Ct.), T.36, Nov. 13, 2000, hearing .

enacted statute, section 102.166, creating a right to protest election results and an opportunity to have ballots manually counted that created windows of time when the right could be exercised. *Harris, supra*, at 18-22, 24-27. That statute, as well as section 102.112, would have been rendered meaningless by the interpretations of sections 102.111 and 102.112 urged by Governor Bush and Secretary of State Harris. And third, the Court faced competing deadlines for “county returns” and “official returns.” *Harris, supra*, at 29.

The Court found the statutes ambiguous and conflicting. *Harris, supra*, at pp. 18-24. Like courts everywhere, this Court resorted to traditional principles of statutory construction – principles that give statutes meaning, force, and effect without reliance on the Constitution or other extraordinary texts. *See, e.g., Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (rejecting “hypertechnical reading” of Internal Revenue Code); *Sanderson v. United States*, 210 U.S. 165, 175-76 (1908) (interpreting statute for granting of new trial motions as allowing for extension of the time to grant such motions.) Citing opinions of Florida cases, it applied four longstanding canons of statutory construction. They were:

- Where two statutory provisions conflict, the specific controls the general;
- Where two statutory provisions conflict, the more recently enacted controls the earlier;
- A statute should not be construed in a way that renders other statutes

meaningless or absurd;

- Related statutory provisions creating an overall scheme of regulation must be construed as a cohesive whole.

Applying these principles, this Court concluded that the Division of

Elections had the authority to accept returns certified after 5:00 PM.

on the 7th day following the general election. This construction was

important, among other things, to give meaning to the protest

procedure *created by the Legislature*, the opportunity for manual

counts *created by the Legislature* in Section 102.166, as well as give

meaning to the requirement of section 101.5614(8), *created by the*

Legislature, that the official returns of a Canvassing Board must

include write-in, absentee, and manually counted votes. In this way,

the Court's decision was no effort to thwart the Legislature's statutory

design, but rather, to give that design force and effect in application.

In the end, this Court's decision, as the U.S. Supreme Court suggested, "construed the Florida Election Code," *Bush, supra*, at 5 – nothing more or less. Its references to broader principles, including the Florida Constitution (*see Section C, infra*), in engaging in that exercise in statutory interpretation was neither exceptional, nor a departure from existing law.²

² It appears that, under the direction of the Republican leadership of that body, the Florida legislature may be filing a brief in this proceeding. *See* Motion of the Florida Legislature to Participate as Amicus Curiae, *Palm*

Nor did the Court's statutory decision announce any new legal principles. In concluding that Canvassing Board returns would be accepted after the seventh day after an election, the Court noted, *see Harris* at 36-37, that its decision was based on a comparable ruling in *Chapell v. Martinez*, 536 So. 2d 1007 (Fla. 1998). In *Chapell*, a Board certification received late, but phoned in earlier, was reviewed. This Court held in *Chapell* that late filed returns could be ignored only if a "compelling reason" existed to do so. *Chapell, supra*, 536 So.2d at 1009. Likewise, this Court rejected appellees argument below that the returns submitted after the seventh day should be ignored because the Boards had not be diligent in conducting their manual counts. *Harris*, at 33. This, too, was not a new legal principle. As this Court noted, *Harris*, at 33 n. 54, it had held in *Boardman v. Esteve*, 323 So.2d 259, 268-69 (Fla. 1975), that when voters "have done all that the statute has required them to do, they will not be disenfranchised solely on the basis of the failure of the election

Beach County Canvassing Board v. Harris, No. SC00-2346. Should this Court decide to accept such a filing, petitioners note that the views of a contemporary legislature – let alone a portion of that legislature -- are not entitled to any deference as to the meaning of statute enacted in 1951 (102.111) or 1989 (102.112).

officials.” *See also Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720, 726 (Fla. 1998).

To summarize, for more than 100 years, in construing election statutes, it has “consistently adhered to the principle that the will of the people is the paramount consideration.” *Harris*, at 9. *See State v. Barber*, 198 So. 49, 51 (Fla. 1940); *Boardman*, *supra*, at 269.

B. This Court’s Finding of an Abuse of Discretion by the Secretary of State Was Based on Traditional Principles of Adjudication

The Court’s subsequent holding, pursuant to the statutes that it interpreted – that Secretary of State Harris abused her discretion in refusing to accept election returns, even where the Canvassing Boards offered substantial reasons for the time they were taking to complete their tabulations – was unexceptional as an application of state law and Florida precedents.

Specifically, after harmonizing and interpreting the statutes under state law, *see Harris* at 34, the Court then turned to the task of determining if Secretary Harris’s decision -- that returns filed after seven days would not be accepted, barring peculiar circumstances not present here – was consistent with Section 102.166 of the Election Code. Fla. Stat. 102.166 (2000)

The case came before this Court with a record. That record established the following without dispute:

- On November 13, 2000, the Secretary of State advised that all Canvassing Boards had to provide certified returns by 5:00 p.m. on November 14, 2000, seven days after the election, or they would be rejected. (Court's Exhibit 3; R-273, Notice of Third Supplemental Filing, Ex. A)
- Below, the Circuit Court for Leon County had issued an injunction stating that Secretary Harris' actions were contrary to law, and that the Secretary could not arbitrarily ignore returns filed after November 14th. (R-41-48)
- While that injunction was in force, several County Canvassing Boards sent Secretary Harris letters advising that they were manually counting ballots pursuant to section 102.166 and wished to submit certified results after November 14 that included the results of those manual counts. (R-273, Notice of Third Supplemental Filing, Ex. G)¹ Those letters identified the time required for a hand count, large voter turnout, large populations, logistical problems, litigation delays, conflicting opinions of the Secretary and the Attorney General, and the time required for a mandatory machine recount as reasons for accepting their returns after November 14.
- Secretary Harris peremptorily rejected all requests. (R-273, Notice of Third Supplemental Filing, Ex. H) She chose to judge each request by the standards established for judicial contests of elections in section 102.168, Florida Statutes (2000). She determined that only fraud, machine malfunction or acts of God would cause acceptance of certified returns after November 14, 2000.
- This Court found that those rejections applied the wrong legal standard and were therefore abuses of discretion:

[W]e conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion. The clear import of the penalty provision of section 102.112 is to deter Boards from engaging in dilatory conduct contrary to statutory authority that results in the late certification of a county's returns. This deterrent purpose is achieved by the fines in section 102.112, which are substantial

¹ This is the exhibit Mr. Boies referred to during rebuttal in response to the Court's question about record evidence.

and personal and are levied on each member of a board. The alternative penalty, i.e., ignoring the county's returns, punishes not the Board members themselves but rather the county's electors, for it in effect disenfranchises them.

Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by the law. To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law.

Harris at pp. 33-34. Thus, far from reaching an extraordinary or unusual conclusion, this Court performed one of its most traditional functions under Florida law: determining whether an official of the State's Executive Branch exceeded her authority when exercising her discretion under state statutes – a determination made against a backdrop of a prior judicial determination that a prior proposed exercise of that discretion was contrary to law.

C. This Court Did Not Impermissibly Rely on the Florida Constitution in Rendering Its Decision

This Court's brief reference to, and discussion of, the Florida Constitution in its decision does not suggest that it used that Constitution to impermissibly constrain the power of the legislature of Florida, under Article II of the U.S. Constitution, to establish a procedure to select Florida's electors on the day prescribed by Congress. *See* U.S. Const., Art. II, Section 1, Cl. 2; U.S. Const. Art. II, Section 1, Cl. 4.

Indeed, the Court's analytical references to the Florida Constitution – contained in just three pages of its 40 page opinion, *see Harris*, at 30-31, 38 – merely stand for the unexceptional proposition that, as a matter of statutory construction, this State's laws should be interpreted in light of the fundamental principle that the basic right to vote is treasured and valued in this State. As one Justice of the U.S. Supreme Court suggested at Argument:

“[S]uppose the [Florida Supreme] court had said, look, we reach our result based on the canons we found in Blackstone. Now, nobody is going to say they said ‘Blackstone is selecting the electors’....

“I suppose they said, we reached this decision based on the values found in the Constitution. That would be like Blackstone.” *Bush, supra*, Trans. of Oral. Arg., at 57-58.

Making brief references to, and a few citations of, the Florida Constitution as an interpretative guide does not change the fundamental nature of this Court's decision: it was an exercise in statutory construction, plain and simple.

Moreover, while this Court did say that legislative enactments were valid only “if they impose[d] no ‘unreasonable or unnecessary’ constraints on the right of suffrage,” *Harris*, at 31, it did NOT go on to employ that dictum to hold any

specific legislative enactment invalid here under the Florida Constitution, or to constrain in any way the Florida legislature's powers under Article II of the U.S. Constitution.² It did not find that the Florida Constitution limited or invalidated the exercise of legislative authority *in this case*. The Court also did not rely on the Florida Constitution as legal support for imposing restrictions on the legislature *in this case*. It simply used the values embodied in the Florida Constitution as one of several guides that confirmed that its statutory interpretation to bring order to an ambiguous and conflicting quilt of statutes *in this case* was consistent with those values.

The Court's decision cites the Florida Constitution only once more in its analysis: suggesting that the importance of that Constitution's "right to vote" confirmed its decision as to whether the Secretary's exercise of her discretion was reasonable. *Harris*, at 38. As an initial matter, it is hard to see how – even if this passage meant that the Florida Constitution was being invoked to limit the Executive Branch's actions here – this would implicate in any way the discretion vested in the Legislative Branch under Article II of the U.S. Constitution. Whatever Article II's grant of power means, surely it does not mean that the Secretary of State of the State

² That is not to suggest that there may not be limits, under the U.S. Constitution, federal law, or the Florida Constitution, on the State Legislature's exercise of this power. Rather, it is to suggest only that such limits were not at issue here, and certainly not imposed by this Court when it gave force and effect to the Legislature's enactments through its interpretation of conflicting statutes.

of Florida – an official of this State’s Executive, not Legislative Branch -- has had her exercise of discretion insulated from judicial review.

Moreover, in the end, the brief citation to the Florida Constitution was not dispositive in constraining Secretary Harris’ discretion. Rather, this Court made it clear it was constraining her discretion on two bases: first, to preserve the Florida Legislature’s statutory design for a contest action, found in 102.168; and second, to protect Florida’s role in the federal electoral process. *Harris*, at 38. The reliance on these touchstones did not run afoul of any federal principle found in Article II of the U.S. Constitution; the Court held only that the Secretary of State cannot use her authority unreasonably to limit the legislatively created rights to protest and contest elections.

D. This Court’s Remedy Was Consistent with 3 U.S.C. §5

Having harmonized and construed the statutes, and having found the record demonstrated that the Secretary abused her discretion in interpreting and applying the statutes, this Court then turned to the task of crafting the proper remedy. Here the Court took great care to protect the Legislature’s authority to provide the method for selecting electors. Indeed, it had already done that by construing and applying the statutes: these statutes are, after all, the Legislature’s work.

In crafting the remedy, this Court assumed that the Legislature did intend to take advantage of the “safe harbor” established by 3 U.S.C. § 5. Though not relying on

that statute directly in reaching its determination under State law, its ruling was respectful of the presence of that statute, in two respects:

- First, the presence of the deadline created by 3 U.S.C. §5 guided the Court when it established the November 26th deadline for submitting amended certifications of manual recounts;
- And second, this Court did not, in any event, make a “change” in Florida’s Election Code that might trigger concern under the “safe harbor” provision. With regard to the first of these considerations, the November 26th deadline recognized the tight schedule in a Presidential election imposed by a state’s desire to take advantage of the protections of 3 U.S.C. § 5. *Harris* at 33, n. 55. Indeed, the whole purpose of this Court’s decision was to make certain that Florida would be able to take advantage of the safe harbor embodied in 3 U.S.C. § 5.

With regard to the second of these considerations, far from “changing the rules in the middle of the game,” as respondents have suggested, this Court’s decision was an effort to “apply the rules” so as to insure that the “game” was being conducted fairly under the rules that were in effect at the time of the November 7th election. One of the critical elements of the structure of these rules was that a “referee” is present to make sure that they are fairly applied: that “referee” is this State’s judiciary -- ultimately, this Court.

In its decision in this case, this Court was doing nothing more than that: acting as a referee – not rewriting the rules. As the U.S. Supreme Court has previously held, when a court “construes a statute, it is explaining its

understanding of what the statute has meant continuously since the date when it became law ... Thus, it is not accurate to say that the ... court's decision ... 'changed' the law that previously prevailed." *See Rivers v. Railway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994).

CONCLUSIONS

For the reasons presented above, this Court should enter an Order stating that, having reconsidered its decision in light of the Supreme Court's ruling, that the decision was correct and will be upheld. This Court need only issue a brief opinion responding to the Supreme Court's request for clarification on two points, which can be addressed as follows:

1. This Court should clarify that it merely interpreted Florida's election code under traditional canons of statutory construction. It did not find that the Florida Constitution circumscribed the Legislature's authority with respect to the selection of electors, and, in particular, did not find that the Florida Constitution altered or invalidated those laws in any respect. Likewise, it applied only established principles of state law in holding that the Secretary of State abused her discretion in this case;
2. This Court should clarify that the federal statute referenced by the U.S. Supreme Court -- 3 U.S.C. §5 -- was not transgressed here, because this Court's opinion merely construed and applied Florida's election laws, and did not constitute a change in those laws, while at the same time it maintained Florida's ability to comply with the "safe harbor" established in federal law;
3. Having addressed these points, this Court should issue an Order reinstating its prior judgment vacated by the U.S. Supreme Court. *See, e.g., National Tea Co. v. State*, 294 N.W. 230, 231 (Minn. 1940) (reinstating the vacated judgment), *on remand from Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *cf. Bush, supra*, at 6 (citing *National Tea Co.*).

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This brief and has been printed in New Times New Roman 14 point with 10 characters per inch.

Attorney

December 5, 2000

Supplemental Brief of Fla. Sec. of State Katherine Harris

IN THE
SUPREME COURT OF FLORIDA

CASE NOS. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY
CANVASSING BOARD,
ET AL.

VS.

KATHERINE HARRIS, ETC.,
ET AL.

VOLUSIA COUNTY
CANVASSING BOARD,
ET AL.

VS.

KATHERINE HARRIS, ETC.,
ET AL.

FLORIDA DEMOCRATIC
PARTY

VS.

KATHERINE HARRIS, ETC.,
ET AL.

Petitioners/Appellants

Respondents/Appellees

**SUPPLEMENTAL BRIEF OF KATHERINE HARRIS, AS FLORIDA
SECRETARY OF STATE, AND KATHERINE HARRIS, L. CLAYTON
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INTRODUCTION

Appellees Katherine Harris, as Florida Secretary of State, and Katherine Harris, L. Clayton Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission, respectfully submit this Supplemental Brief on the implementation of the Mandate of the United States Supreme Court.

ARGUMENT

I. This Court's Decision of November 21, 2000, Relied on the Paramount Importance of the Right of Suffrage Under the Florida Constitution.

In its decision of November 21, 2000, this Court addressed, along with another issue, the apparent conflict between section 102.166(4), Florida Statutes (the time frame for conducting a manual recount) and section 102.111 (the time frame for submitting and certifying county returns), as well as the apparent conflict between the mandatory language in section 102.111 and the permissive language of section 102.112. Palm Beach Canvassing Bd. v. Harris, 2000 WL 1725434 at *4 (Fla. Nov. 21, 2000).

From the outset of its opinion, this Court made clear that “hyper-technical statutory requirements” must give way to the of suffrage implicit in the Florida Constitution. See id. at *4 (“the will of the people, not hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases.”); at

*6 (“all political power is inherent in the people”). After reviewing the relevant portions of the Florida Election Code, the Court observed that:

the County canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. The statutes make no provision for exceptions following a manual recount. If a Board fails to meet the deadline, the Secretary is not required to ignore the county’s returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

Id. at *11.

The Court then reiterated the general principles of Florida constitutional law that the judiciary must “attend with special vigilance whenever the Declaration of Rights is in issue,” and that “[t]he right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished.” Id. at *12. In accordance with these general principles, the Court stated the seemingly applicable proposition of law that “the Legislature may enact laws regulating the electoral process . . . only if they impose no ‘unreasonable or unnecessary’ restraints on the right of suffrage.” Id.

Looking as well to the principles of Florida constitutional law for guidance, the Court concluded:

Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

Id. at *15.

The United States Supreme Court subsequently granted Governor Bush's petition for certiorari review to address whether the Court's decision conflicted with federal constitutional and statutory law. Bush v. Palm Beach Canvassing Bd., 2000 WL 1731262 (U.S. Nov. 24, 2000). On December 4, 2000, the Supreme Court issued an opinion in which it vacated this Court's decision and remanded for clarification of the basis for this Court's conclusion.

In its decision, the U.S. Supreme Court has asked this Court to clarify the holdings of its decision vis-a-vis federal statutory and constitutional principles, obviously recognizing this Court's ability to develop Florida law. Apparently recognizing that this Court did not center its opinion on federal law, the high court asks this Court to clarify its opinion as to impact on the legislature's power to select the method of appointing electors for President and Vice President of the United States, or recognition of state constitutional rights that might collide with 3 U.S.C. § 5 or article II of the U.S. Constitution.

In so doing, the Supreme Court of the United States counsels:
Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Bush v. Palm Beach County Canvassing Board, 2000 WL 1769093 at *3 (U.S. Dec. 4, 2000).

II. In Presidential Elections, the Application of Article II, Section 2 Supersedes the Right of Suffrage Under the Florida Constitution.

The U.S. Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1, cl. 2. This provision grants plenary

power to state legislatures to determine the manner for the appointment of electors for President and Vice President of the United States. In construing this constitutional provision in the context of a challenge to the methods set forth by the Michigan State Legislature to appoint electors, the Supreme Court made clear that the appointment of presidential electors is placed absolutely with the legislatures of the several states:

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

McPherson v. Blacker, 146 U.S. 1, 27 (1892) (emphasis added).

In other words, there is no right of direct suffrage when it comes to the appointment of electors for President and Vice President of the United States. Absent an express delegation of authority, state courts possess no power, through the state constitution or otherwise, to alter the “manner” set by the legislature for the appointment of presidential electors. See U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (“In the absence of any constitutional delegation to the States of

power to add qualifications to those enumerated in the Constitution, such a power does not exist.”). There has been no such delegation of authority in this case.

In fashioning its November 21 decision, this Court relied heavily on the constitutional right of suffrage that the Court found implicit in Florida’s Constitution. The Court’s decision is a crafted compromise between this state constitutional right and the Florida Election Code. The issues this Court found troublesome and addressed in its decision can, however, be addressed by the Florida Legislature —the only body capable of doing so, for the U. S. Constitution and its implementing statutes require absolute deference to the legislative scheme.

III. Under 3 U.S.C. § 5, Controversies or Contests Concerning the Appointment of Electors Must be Resolved Under Laws Enacted Before Election Day.

The United States Supreme Court has “recognized broad congressional power to legislate in connection with the elections of President and Vice President.” Buckley v. Valeo, 424 U.S. 1, 14 n.16 (1976). Congress exercised that power when it enacted 3 U.S.C. § 5, which applies to state court determinations relating to “any controversy or contest concerning the appointment of all or any of the electors.” Under that section, such controversies resolved by reference to “laws enacted prior to” election day and made at least six days before the meeting of the

electors “shall be conclusive, and shall govern in the counting of the electoral votes.” 3 U.S.C. § 5.

This Court’s decision did not address 3 U.S.C. § 5. See Bush, 2000 WL 1731262 at *3. This Court should examine section 5 and reconsider its previous ruling. A ruling from this Court consistent with section 5 “would assure finality of the State’s determination” of this election controversy. Id. The “wish to take advantage of the ‘safe harbor’ [provided by 3 U.S.C. § 5] would counsel against any construction of the Election Code that Congress might deem to be a change in the law.” Id.

This Court’s previous decision may be viewed by Congress as having changed Florida’s election laws. This Court sought to protect Florida voters, and its decision should not “compromise the integrity of the electoral process . . . by precluding Florida voters from participating fully in the federal electoral process.” Palm Beach County Canvassing Bd., 2000 WL at *13. To ensure that Florida’s participation in the electoral college is not prejudiced, and recognizing the unique aspects of Presidential elections, this Court should affirm the decision of Judge Lewis.

CONCLUSION

This Court must reconsider its previous decision in light of the unique aspects of a presidential election. The application of state constitutional and equitable principles to modify the legislative scheme for a presidential election violates the United States Constitution and 3 U.S.C. § 5.

These Appellees respectfully suggest that since the issuance of this Court's original opinion on November 21, 2000, events may have rendered moot some of the issues addressed by the Court; thus, this Court may consider a more streamlined revised opinion. In any event, this Court should issue an opinion in which it addresses the Election Code in the specific context of a presidential election, and recognizes the overriding principles of federal law that place the power to determine the method for the appointment of electors solely in the Legislature. Affirming Judge Lewis's order as it applies to the November 7, 2000, election of presidential electors would serve this purpose and avoid the constitutional and statutory infirmities identified by the United States Supreme Court. Moreover, it would uphold and protect the right to vote for electors that the Florida Legislature has bestowed upon the State's citizens by stewarding Florida

into the safe harbor of 3 U.S.C. § 5, and thereby prevent a congressional challenge to the electors appointed by the State.¹

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¹ This request by the U.S. Supreme Court is quite apropos of this Court's continued concerns articulated during oral argument and in its decision that Florida's electoral votes not be put in peril.

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December 5, 2000

Supplemental Brief of Palm Beach County Canvassing Board

IN THE
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PALM BEACH COUNTY CANVASSING BOARD V. KATHERINE HARRIS, *ET AL.*
CASE NO. SC00-2346

VOLUSIA COUNTY CANVASSING BOARD, *ET AL.* V. HARRIS, *ET AL.*
CASE NO. SC00-2348

FLORIDA DEMOCRATIC PARTY V. HARRIS, *ET AL.*
CASE NO. SC00-2349

**SUPPLEMENTAL BRIEF OF
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FOLLOWING REMAND FROM THE
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STATEMENT OF THE CASE

This Court's November 21, 2000 judgment, construing conflicting provisions of the Florida Election Code in disputes arising from the recent Presidential election, was reviewed by the Supreme Court in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. ___, 2000 WL 1769093 (2000) (per curiam). After expedited briefing and oral argument, on December 4, 2000, the Supreme Court "decline[d] at this time to review the federal questions asserted to be present" (*id.*, slip op. at 6), vacated this Court's judgment, and "remanded for further proceedings not inconsistent with this opinion." *Id.*, slip op. at 7. The same day, this Court ordered that supplemental briefs would be accepted from the parties "on the implementation of the Mandate to this Court from the United States Supreme Court."

STATEMENT OF THE FACTS

We do not restate the facts, which are set forth in detail in this Court's November 21, 2000 opinion.

ARGUMENT

THIS COURT’S NOVEMBER 21, 2000 DECISION DID NOT USE THE FLORIDA CONSTITUTION TO OVERRIDE THE WILL OF THE LEGISLATURE, NOR DID IT CHANGE THE LAW. THE DECISION POSES NO CONFLICT WITH ARTICLE II, § 1, CL. 2 OF THE UNITED STATES CONSTITUTION OR TITLE 3 U.S.C. § 5

The Supreme Court of the United States stated:

[W]e are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5.

Bush v. Palm Beach County Canvassing Board, 531 U.S. ___, slip op., p. 7 (Dec. 4, 2000).

This Court’s statement of the issues presented to it demonstrates that neither the United States Constitution nor 3 U.S.C. § 5 were the focus of the arguments: “Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?” *Palm Beach County Canvassing Board v. Harris*, ___ So. 2d ___, 2000 WL 1725434 (Fla. Nov. 21,

2000) (slip op., p. 10). A footnote noted “Neither party has raised as an issue on appeal the constitutionality of Florida’s election laws.” *Id.*, slip op. p. 10, n. 10.

The fact that this Court’s opinion discussed and emphasized the importance of the right to vote under the Florida Constitution (*see especially* slip op. 32, n. 52) cannot fairly be said to mean that the Court “saw the Florida Constitution as *circumscribing* the legislature’s authority under Art. II, § 1, cl. 2.” *Bush v. Palm Beach County Canvassing Board*, *supra*, slip op. p. 7 (emphasis supplied). This Court’s opinion repeatedly referred to the Florida Election Code as the source of the governing law and the source of the problems presented by the conflicting opinions of the Secretary of State and the Attorney General. The statutory construction principles utilized by the Court focused on the Election Code and were devoid of any use of the Florida Constitution.

First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute.

* * *

Second, it is also well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.

* * *

Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision.

* * *

Fourth, related statutory provisions must be read as a cohesive whole.

Palm Beach County Canvassing Board v. Harris, supra, slip op. at 24-26 (footnotes omitted). And the Court's conclusions were tied to the Election Code, not the Florida Constitution:

We conclude that, consistent with the Florida election scheme, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the electoral process.

* * *

CONCLUSION

According to the legislative intent evinced in the Florida Election Code, the permissive language of section 102.112 supersedes the mandatory language of section 102.111.

* * *

As explained above, the Florida Election Code must be construed as a whole.

Palm Beach County Canvassing Board v. Harris, supra, slip op. at 36, 38-39.

This Court did what a court properly does. Karl Llewellyn, speaking of courts and statutes, wrote:

But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use [Jerome] Frank's figure, take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and to play it in harmony with the other music of the legal system.

KARL LLEWELLYN, THE COMMON LAW TRADITION 373 (1960) (emphasis in original).

This Court's decision achieved that harmonious result. The Court did not carve out a new rule of law; it sought to make sense out of the conflict between section 102.111(1), enacted in 1951, and sections 102.112(1) and (2), enacted in 1989.

[I]ncreasingly, as any statute gains in age [,] its language is called upon to deal with circumstances utterly un contemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach

far beyond details known or knowable at the time of drafting.

LLEWELLYN, *supra* at 374 (emphasis in original).

What the Court did was not legislative, it was ordinary judging.

More specifically, the judge is uniquely competent to place statutes in their temporal setting, taking account of what happens both before and after a statute is passed. Moreover, the exercise of this competence inevitably results from applying texts to facts, an exercise that forces the judge to think about how a text's meaning interacts with the past and the future (about the statute's intent). Once this thought process begins, judgment requires thinking about substantive values and comparative institutional competence; however, these are the results of ordinary judging. . . .

WILLIAM D. POPKIN, STATUTES IN COURT, THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 246 (1999).

This Court's November 21, 2000 decision recognized the substantive values of the Florida Constitution, but those values did not dictate the outcome. The result – reconciliation of the conflicting election statutes and a date for certification of election results – was “to make sense rather than nonsense out of the corpus juris.” *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101, 111 S. Ct. 1138, 113 L. Ed.2d 68 (1991). Justice Frankfurter put it another way, quoting Lord Justice Denning in

Seaford Court Estates, Ltd. v. Asher [1949] 2 K.B. 481, 499 (C.A.): “‘A judge must not alter the material of which it [an act] is woven, but he can and should iron out the creases.’” Felix Frankfurter, *A Symposium on Statutory Construction, Foreward*, 3 Vand. L. Rev. 365, 367 (1950).

This Court tailored its decision to preserve every aspect of the Florida Election Code. The opportunity to ensure the accuracy of the vote was preserved. The duty of the Secretary of State to certify election results was preserved. The opportunity to lodge a statutory post-certification election contest was preserved. All of this was done under laws that were enacted prior to November 7, 2000.

CONCLUSION

This Court’s resolution of the subsequent-to-election dispute did not use the Florida Constitution to “circumscribe the legislative power.” Thus, there was no conflict with Article II, § 1, cl. 2. Nor did the November 26, 2000 certification date constitute a “law enacted prior to the day fixed for the appointment of electors.” Thus, there was no conflict with 3 U.S.C. § 5. Only this Court can say what “consideration” it gave to that statute, but the decision and the common law rules of judging support the conclusion that the Court did not offend it.

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December 5, 2000
Amicus Brief of Florida Legislature

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CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF THE CASE AND FACTS

Amici Curiae, the FLORIDA HOUSE OF REPRESENTATIVES and the FLORIDA SENATE (the “Legislature”), hereby adopt the Statement of the Case and Facts as reported in the per curiam decision of the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*, No. 00-836, 531 U.S. --- (Dec.4, 2000).

INTRODUCTION AND SUMMARY

The Legislature is pleased to have this opportunity to advise the Supreme Court of Florida as to its views on the great issues now before this Court regarding the Presidential Election of 2000. As this Court knows, the Legislature was unable to advise the Court of its views before it rendered its prior decision because it was not until November 21, 2000, that the Legislature had a House Speaker and Senate President who could authorize the hiring of counsel. FLA. CONSTITUTION ART. III, §2, §3a. Because the parties before this Court were focused on different concerns, the prior briefing thus did not inform this Court regarding the important and distinctive legal interests the Legislature has both (a) in preserving its plenary power to direct the manner by which Presidential Electors are appointed, and (b) in satisfying beyond any doubt the safe harbor provisions of 3 U.S.C. §5 in order to assure Florida is represented in the Electoral College. These considerations were recognized as legally valid by the United States Supreme Court in its unanimous decision, and each played a pivotal role in its decision to vacate the prior decision of this Court. The Legislature respectfully submits that those important state interests require this Court to replace its vacated decision with a new opinion that confirms the original deadlines for certifications and county manual recounts set forth in the prior enactments of this Legislature.

ARGUMENT

Both houses of the Florida Legislature normally do not unite at the bar of this Court unless it is to advocate an institutional interest of the Florida Legislature, usually based on separation of powers principles. For instance, in *Chiles v. Phelps, et al.*, 714 So.2d 453 (Fla. 1998), the Florida Legislature argued separation of powers doctrine in a dispute between the legislative branch and the executive branch concerning the validity of a veto override, specifically citing this Court's earlier interpretation requiring the judiciary to "refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable test of the constitution." *McPherson v. Flynn*, 397 So.2d 665, 667 (Fla. 1981). This case raises issues of parallel import – the proper role of the Florida Legislature in implementing the exclusive and demonstrable obligation assigned to it by Art. II, Sec. 1, U.S. Constitution; and Title III, Sec. 2, U.S. Code.

A. THE STATE LEGISLATURE’S PLENARY POWER TO DIRECT THE MANNER BY WHICH ELECTORS ARE CHOSEN BARS ANY STATUTORY INTERPRETATION OR USE OF THE STATE CONSTITUTION THAT MIGHT CIRCUMSCRIBE THAT POWER.

In its opinion, the U.S. Supreme Court recognized that in “the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution.” *Per Curiam Op.* at 4.

This constitutional clause confers “plenary power to the state legislatures in the matter of the appointment of electors.” *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).¹

Furthermore, this direct grant of authority “operates as a limitation upon the State in respect of any attempt to circumscribe the legislative power.” Per Curiam Op. at 5 (quoting *McPherson*, 146 U.S. at 25). In particular, neither state courts nor state constitutions may circumscribe the plenary power of a state legislature to direct the manner in which the State chooses its Presidential electors:

“The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.”

McPherson, 146 U.S. at 34-35 (quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)).

The U.S. Supreme Court vacated the prior opinion of this Court in part because it concluded that portions of this Court’s opinion could be read as allowing provisions of the state constitution to affect its

¹ Ordinarily, of course, when federal law remits a matter to the States it takes the state legal system as it finds it, including the relations within that system of the various branches of the state government. Article II, section 1, clause 2, like Article V of the United States Constitution, however, specifically assigns functions to the state legislature as such. We respectfully submit that it is no more appropriate for this Court, applying its interpretation of the State’s Constitution or general equitable principles, to circumscribe the Legislature’s authority in this matter than it would be to attempt to alter the Legislature’s determination in respect to its power under Article V of the United States Constitution. In those two unusual instances the Legislature’s authority derives directly from the Constitution of the United States.

statutory construction, which would violate the *McPherson* doctrine that the state constitution cannot “circumscribe the legislative power” over Presidential electors. Per Curiam Op. at 5, 7. The Legislature respectfully submits that this concern is well-founded, and that the same statutory construction could not reasonably have been reached without the state constitutional principles referred to by this Court in its prior opinion. In its prior opinion, this Court stated that the state constitutional principle of advancing the will of the people must prevail over “technical statutory requirements” like deadlines for filing returns. It also relied on its particular conception that as a matter of state constitutional law the will of the people is best ascertained by manual recounts that not only re-count but re-interpret the ballots counted by machines.

1. This Court Used State Constitutional Law to Circumscribe the Statutory Discretion the Legislature Directed the Secretary Would Have.

This Court’s references to the state constitution played a necessary role in the portion of this Court’s opinion (Part VIII) that circumscribed the statutory discretion that this Court found the Legislature had given the Secretary of State. See *Palm Beach County Canvassing Board v. Harris*, 2000 W.L. 1725434, at *12-13 (Fla.); see also Per Curiam Op. at 5 (quoting many of these references). In the portions of its vacated opinion leading up to Part VIII, this Court had concluded that the Legislature intended to vest the Secretary of State with discretion to ignore late returns. See *Palm Beach*, 2000 W.L. 1725434, at *11. This Court then concluded that this statutory discretion must be circumscribed by state constitutional law.

This Court ended Part VII of its opinion by stating that “[t]o determine the circumstances under which the Secretary may lawfully ignore returns . . . it is necessary to examine . . . constitutional law at both the state and federal levels.” *Id.* Then, after citing only state constitutional law on the right to vote in Part

VIII, this Court stated: “Based on the foregoing, we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion.” *Id.* at *13. Since the word “foregoing” could refer only to state constitutional law, it was clearly the basis for this Court’s decision to circumscribe the statutory discretion of the Secretary.

Indeed, this Court expressly disapproved the legislative direction that an appropriate penalty for missing the statutory deadline was to ignore late county returns.² This Court reasoned that this “penalty, i.e., ignoring the county’s returns, punishes not the Board members themselves but rather the county’s electors, for it in effect disenfranchises them. . . . To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law.” *Id.* at *13. By the term “longstanding law” the Court must have been referring to the state constitutional law it had just quoted on preserving the right of voter franchise, since that is the only law that could be said to have been “violated” by a statutory penalty that the Court felt infringed the right of franchise.³ Consistent with this reading, this Court concluded that late county returns could be ignored *only*

² See Fla.Stat. § 102.111 (2000) (“If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.”); Fla.Stat. § 102.112 (2000) (“If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.”)

³ After reaching this conclusion that such statutory discretion would violate state constitutional law on the right of franchise, this Court went on in Part VIII to cite two cases from the U.S. and Illinois Supreme Courts. *Id.* at *13-14. But since these cases were discussed afterwards, they clearly were not the basis for this conclusion. Indeed, these cases were not cited to establish the right of franchise at all, but rather to support this Court’s empirical premise that manual recounts produced a more accurate vote count. *Id.*

when the Court determined that enforcing the deadline would advanced the state constitutional right of franchise in some other way, like preserving a period for election contests or making sure Florida is represented in the Electoral College. *Id.*

In short, this Court concluded that: “Technical statutory requirements must not be exalted over the substance of this right” of franchise under state constitutional law. *Id.* In other contexts, such a ruling might be permissible. But in this context, as the U.S. Supreme Court has made clear, those “technical statutory requirements” are legislative directions about the manner in which Presidential electors will be chosen, and because of the express authority given to state legislatures under the U.S. Constitution, those legislative directions trump any contrary state constitutional right.

In exercising its plenary power to determine the manner in which Presidential electors are chosen, a State Legislature is free to place discretion in the hands of election officials without having that discretion circumscribed by state constitutional law or any judicial review based on inherent equitable powers. Indeed, Congress has expressly recognized that a State can render its election results conclusive by providing for the “final determination of any controversy or contest . . . by judicial or *other* methods or procedures,” which would plainly include the “other method” of having the Secretary of State decide the issue. 3 U.S.C. §5 (emphasis added). *See also* LUCIAS WILMERDING, JR., *THE ELECTORAL COLLEGE* 42-43 (Rutgers University Press 1958).

Thus, when this Court itself concluded that the Legislature intended to vest the Secretary of State with discretion to ignore late county returns, and then circumscribed that statutory discretion with principles of state constitutional law, this Court necessarily also circumscribed the Legislature’s appointment authority.

That is impermissible, as was made clear in both *McPherson* and in the U.S. Supreme Court decision which vacated this Court's prior decision.

2. This Court Also Used State Constitutional Law to Drive Its General Statutory Construction

The use of state constitutional principles in the vacated opinion was not limited to circumscribing statutory discretion. This Court also began that opinion with the proposition that election cases must be guided by the state constitutional principle of advancing the “will of the people” rather than on a “hyper-technical reliance upon statutory provisions.” *Palm Beach*, 2000 W.L. 1725434, at *4. This was deemed by this Court as “the paramount consideration.” *Id.* This “fundamental principle” that the Court acknowledged guided its decision, *id.*, was not cited as mere makeweight. Rather, this principle, and the particular state constitutional conception that the will of the people is more accurately ascertained by manual recounts that not only re-count but re-interpret the ballots counted by machines, led this Court to adopt the premise that the state legislature must have meant to provide for such interpretive manual recounts.

Without this premise, there would have been no convincing reason to reject the Secretary of State's opinion that instead the Legislature meant only to provide for manual recounts when the machines commit an error in counting rather than in interpretation. *See id.* at *5-6. The Secretary's opinion was more consistent with the legislative history of Fla. Stat. §102.166, which plainly indicated that it was enacted to respond to a county-specific error in machine counting, not a claim that manual recounts are more accurate than machine recounts because of errors in punch cards. The Legislature, in determining the manner of conducting Presidential elections, is surely free to adopt the premise (contrary to this Court when it interprets the state constitution) that absent an uncorrectable machine error in counting, machine interpretations are more accurate than “interpretive” manual recounts, which are susceptible to problems

of fatigue, human error, unintended ballot alteration, conscious or unconscious bias, and fraud or other mischief. The Secretary's opinion was also more consistent with Florida election practice prior to this election because, as the Attorney General conceded in oral argument before the U.S. Supreme Court, no county had previously done a manual recount because of a claim that a county's machines were missing partially perforated or indented chads. *See* Oral Arg. Tr. 39-40.⁴ The Secretary's opinion was also consistent with the fact that the statutory protests that can lead to manual recounts are county-specific complaints about a particular county's machines, whereas a complaint about punchcards generally undercounting votes really raises a statewide issue that should be pursued, if at all, only in a statewide contest.

Perhaps most important, the Secretary's opinion was plainly within the authority conferred on her by the Legislature, which expressly gave the Secretary (not the courts) the power to issue opinions interpreting the election code that would be binding on county canvassing boards.⁵ Again, it is plainly within the U.S. constitutional power of the Legislature to direct the manner of appointing Presidential electors by giving the Secretary (rather than the courts) this power, and the United States Code plainly contemplates that the States can resolve election controversies using non-judicial "methods or procedures," 3 U.S.C. §5, such as having them resolved by the Secretary of State. This Court's decision to

⁴ This concession was made by Paul Hancock, representing the Attorney General. Obviously this Court cannot be faulted for being unaware of this concession since it was made after its decision, but this Court may now properly take it into account on remand.

⁵ FLA. STAT. §106.23(2) ("The Division of Elections shall provide advisory opinions when requested The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. §97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

circumscribe this statutory power with this Court's belief that manual recounts are more accurate at interpreting ballots than machine counts thus unconstitutionally circumscribed the Legislature's plenary power to determine the manner by which Presidential electors are appointed.

Further, without this Court's premise that the Legislature must have wanted to provide for interpretive manual recounts, there would not have been the supposed statutory "conflict" between the seven-day deadline and the manual recount protest procedure that this Court cited to deviate from the deadline. *Palm Beach*, 2000 W.L. 1725434, at *7-8. There would have been no conflict because a machine counting error arises seldom and is normally correctable without need of a manual recount by corrections to the machines or software. Further, even when it arises, such a ministerial manual recount (as opposed to an elaborate "interpretive" manual recount) can easily be done within a seven-day period by hiring additional counting teams, *see* Fla. Stat. §102.166(7)(a) ("The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots."), and is not subject to the bottleneck problem that results when interpretive decisions must be made by a three-person canvassing board for each county.

In short, the state constitutional principle that favors manual recounts as the best means of ascertaining the will of the voters was not just invoked to help resolve a statutory ambiguity; it was the premise that created the supposed statutory conflict and ambiguity to begin with.

3. This Court's Statutory Construction Also Deviated From the Legislature's Directions in Other Ways.

The other supposed statutory conflict this Court found was between the “shall” and “may” provisions of FLA. STAT. §§102.111-112, which this Court resolved with other canons. *Palm Beach*, 2000 W.L. 1725434, at *9-10. But the supposed conflict is dubious. An important canon of statutory construction states that statutory provisions must, if possible, be read to be consistent and to avoid making some statutory language meaningless. Although the Court cited this canon, *id.* at 10, the Court's opinion seems to miss the fact that its interpretation does render the “shall” provision of §102.111 utterly meaningless. A reading that would be consistent with both provisions and give meaning to both would be to say that §102.111 governs the Secretary, and constitutes a legislative direction as to what she “shall” do to late returns, whereas §102.112, after stating that the county officials “shall” meet the deadline, also warns them that if they fail to do so their county returns “may” be disregarded. The direction as to what the Secretary “shall” do also seems a far more specific direction to govern her actions than a statute warning the canvassing boards about the consequences if they fail to meet the deadline.

The canon that a later statute can implicitly repeal an older one is valid, but its application here misses a key fact about legislative procedure in Florida. Although §102.112 was originally enacted after §102.111, both statutory provisions have been repealed and re-enacted every other year. *See, e.g.*, ch. 11.2421, 11.2422, Florida Statutes (1999). In each re-enactment, then, the Legislature must have thought the two provisions were consistent. Thus they should be read to give meaning to both rather than to allow one to repeal the other. Further, the legislative history of the original adoption of §102.112 shows a clear intent to retain the deadline and mandatory wording of §102.111. Although the Senate had proposed

amending §102.111 to extend the deadline from seven to thirteen days and to change the “shall” to a “may”, *see* 1989 Senate Journal, p. 819, the House rejected both amendments, *see* 1989 House Journal, p. 1320, and then the Senate agreed to the House version. Chapter 89-338, §30 at 2162, Laws of Florida. The intent of the legislature in enacting §102.112 was thus not to extend deadlines or create discretion to do so. It was rather merely to codify *Chappell v. Martinez*, 536 So.2d 1007 (Fla. 1988), which allowed the State Elections Canvassing Commission to include in its certification county returns that were not in the proper form but were timely under §102.111, and not to authorize the Secretary of State or the Commission to delay certification to a later date.

Finally, this Court concluded that the statute must be read to allow late returns because otherwise the statutory fine provision would be meaningless. *Palm Beach*, 2000 W.L. 1725434, at *10. But we doubt the Court meant to put much weight on this point since a closer look reveals that the point clearly does not hold. The Court reasoned: “if a Board simply completed its count late and if the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines.” *Id.* The flaw in this logic is that nothing in the statute suggests that a board could avoid fines by filing no returns. To the contrary, the statute expressly states that “[t]he department shall fine each board member \$200 for each day such returns are late.” §102.112(2). Thus, if a board is already late with returns that will thus be disregarded, the penalty still gives boards an incentive to deliver their returns because for every additional day the board is late each board member will be fined another \$200.

In short, reading the “shall be ignored” provision of §102.111 out of the election code does not conform to the constitutional requirement that Presidential elections must be conducted in the manner

directed by the Legislature. Since all “shall” provisions are read to avoid absurd results not contemplated by the Legislature, the fact that the Secretary conceded that this provision would not be enforced in the event of a hurricane does not undermine her interpretation. But the possibility of manual recounts cannot be deemed an event unanticipated by the Legislature when it set the deadline in the same statute that created the manual recount provisions.

B. THE STATE LEGISLATURE HAS AN OVERRIDING INTEREST IN HAVING STATE COURTS INTERPRET ITS ELECTION CODES TO AVOID ANY CONSTRUCTION THAT CONGRESS MIGHT DEEM TO BE A CHANGE IN THE LAW.

In its opinion, the U.S. Supreme Court also emphasized that this Court must take into account that “a legislative wish to take advantage of the ‘safe harbor’ [provided by 3 U.S.C. §5] would counsel against any construction of the Election Code that Congress might deem to be a change in law.” *Per Curiam Op.* at 6. This was an issue that was not adequately briefed before because the Legislature was not previously represented before this Court on the matter.

The Legislature does have a powerful legislative wish to take advantage of the safe harbor provisions of 3 U.S.C. §5. Any statutory construction that Congress “might deem” a change in law would mean that the election results might no longer be binding on Congress when it counts the electoral votes, and that Florida might go unrepresented in the Electoral College. *See* 3 U.S.C. §§ 5, 15. It would be a travesty, after all Florida has been through these past few weeks, for the end result to be that all 6 million voters in Florida might be disenfranchised in the Electoral College.

In assessing this issue, it is crucial to frame it in the way the U.S. Supreme Court did. The question is not whether this Court believes that its statutory construction constituted a change in the law. The question is whether this Court feels there is any reasonable risk that “Congress might deem” its statutory construction as a change in law. Per Curiam Op. at 6. The Legislature respectfully submits that, whether or not this Court accepts the arguments described above, there is a reasonable risk that Congress might accept those arguments, and thus refuse to count Florida’s electoral votes.

In short, because any State Legislature would have a strong interest in assuring its electoral votes are counted by Congress, the construction of statutes governing Presidential elections must be governed by a powerful canon against any construction that might be deemed to constitute a change in law. Indeed, scholars have argued that this is a general canon that should govern the interpretation of all statutes. *See* David Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 928 (1992). But the general force this canon has must be rendered conclusive when the risk that the interpretation would be deemed a change in law would have a result so plainly contrary to legislative intent: depriving Florida of representation in the Electoral College.

There is also another risk that, if realized, would mean that the Florida election results would not be binding on Congress when it counts the electoral votes. That is the risk that contests would not finally be determined by midnight December 11, 2000. 3 U.S.C. §5. If the contests go beyond that date, there is again the risk that Congress will not regard the election results as conclusive and that Florida might go unrepresented in the Electoral College. The Legislature thus urges that this Court take all reasonable steps to assure that all contests and appeals are finally adjudicated and appealed before that deadline.

If these risks do not abate, it would appear that the only way the Legislature could assure that Florida's electors would be represented in the Electoral College would be for the Legislature to conclude that Florida's election of Presidential electors "failed to make a choice" and to appoint those electors directly under 3 U.S.C. §2. While the statutory term "failed to make a choice" probably encompasses other cases (e.g., a hurricane on election day), it seems plain that at a minimum it should be understood to permit a state legislature to conclude that an election has failed to make a choice when the relevant Congressional statute provides that the election result is not binding on Congress. Congress could not have meant that a State faced with the problem that its election contests have not been finally concluded by December 12th can do absolutely nothing about the fact that under 3 U.S.C. §5 the votes of its electors are no longer assured of being counted by Congress.

But plainly it would be far more preferable if this Court could avoid any arguable changes in law and resolve all contests before December 12, 2000, so that legislative action becomes unnecessary.

CONCLUSION

This Court should replace its vacated decision with a new opinion that confirms the original deadlines for certifications and county manual recounts set forth in the prior enactments of this Legislature. This Court should also enter such orders as are necessary to resolve all election contests without making any arguable changes in law by midnight December 11, 2000.

Respectfully submitted December 5, 2000.

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December 6, 2000
Brief of Al Gore & Joseph Lieberman

**IN THE SUPREME COURT
OF THE STATE OF FLORIDA**

CASE NO. SC00-2431

On Appeal from the Second Judicial Circuit

CASE NO. 1D00-4745

ALBERT GORE, Jr., Nominee of the Democratic Party of the
United States for President of the United States, and
JOSEPH I. LIEBERMAN, Nominee of the Democratic
Party of the United States for Vice President of the United States,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE
STATE OF FLORIDA, and SECRETARY OF AGRICULTURE
BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS
AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF
ELECTIONS,
individually and as members of and as THE FLORIDA ELECTIONS
CANVASSING COMMISSION,

and

THE MIAMI-DADE COUNTY CANVASSING BOARD,
LAWRENCE D. KING, MYRIAM LEHR and DAVID C. LEAHY
as members of and as THE MIAMI-DADE COUNTY CANVASSING
BOARD, and DAVID C. LEAHY, individually and as Supervisor of
Elections,

and

THE NASSAU COUNTY CANVASSING BOARD, ROBERT E.
WILLIAMS,

SHIRLEY N. KING, AND DAVID HOWARD (or, in the alternative,
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NASSAU COUNTY CANVASSING BOARD,
and SHIRLEY N. KING, individually and as Supervisor of Elections,

and

THE PALM BEACH COUNTY CANVASSING BOARD,
THERESA LEPORE, CHARLES E. BURTON AND
CAROL ROBERTS, as members of and as the PALM BEACH COUNTY
CANVASSING BOARD, and THERESA LEPORE, individually
and as Supervisor of Elections,

and

GEORGE W. BUSH, Nominee of the Republican
Party of the United States for President of the United
States and RICHARD CHENEY, Nominee of the
Republican Party of the United States for
Vice President of the United States,

Appellees,

CASE NO.

ALBERT GORE, Jr., Nominee of the Democratic Party of the
United States for President of the United States, and
JOSEPH I. LIEBERMAN, Nominee of the Democratic
Party of the United States for Vice President of the United States,

Petitioners,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE
STATE OF FLORIDA, and SECRETARY OF AGRICULTURE
BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS
AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF

ELECTIONS,
individually and as members of and as THE FLORIDA ELECTIONS
CANVASSING COMMISSION,

Respondents.

BRIEF FOR APPELLANTS,
OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS
OR OTHER WRITS

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is an election contest action pursuant to Section 102.168, Florida Statutes. This is the election contest that this Court held in *Palm Beach County Canvassing Board v. Harris*, 2000 Fla. Lexis 2311 (Fla. Nov. 21, 2000) *vacated and remanded*, *Bush v. Palm Beach County Canvassing Board*, 2000 U.S. Lexis 8087 (Dec. 4, 2000) (per curiam) (“*Harris*”) that Plaintiffs had a right to bring; the contest action that caused the Court in *Harris* to set the mandatory acceptance time for November 26 in order to permit this action to be completed by December 12; the contest action that Defendants' counsel told this Court in *Harris* was the right way for Plaintiffs to challenge the failure to count the ballots at issue.

Plaintiffs brought this action on November 27, 2000, following the November 26 certification by the Election Canvassing Commission and the Secretary of State of the Presidential election. At the first hearing before the trial court on November 27, and virtually every day thereafter, Plaintiffs urged the trial court to begin a review of the contested ballots. The court repeatedly refused to do so. The trial took place on December 2 and 3, during which the disputed ballots were admitted into evidence. Nonetheless, on December 4, the trial court dismissed the contest without ever reviewing even one of the contested ballots. Transcript of Judge Sauls' Ruling Case No. 00-2808 (Cir. Ct. Leon County 12/4/00) (“Ruling Tr.”) at 13.

The trial court found “voter error, and/or less than total accuracy, in regard to the punchcard voting devices utilized in Dade and Palm Beach Counties, which these counties have been aware of for many years.” (Ruling Tr. at 10) This finding was supported, indeed compelled, by:

(a) The evidence given by Plaintiffs' witness Kimball Brace that a manual review of punchcard ballots was required in close elections because of the many ways in which punchcard ballots might be marked due to defects or limitations in the machines, or by the failure of the voter to completely follow instructions, such that a machine would not register a vote that the voter intended to cast. Trial Tr. I: 78-83, 89-90, 95: 10-20.

(b) The evidence given by Defendants' expert witness John Ahmann that a manual review of punchcard ballots was necessary in very close elections because of limitations in the accuracy of machine counts—and that Miami-Dade had rejected a new stylus that he had proposed to the county to reduce the inability or failure of voters to dislodge chads; that the build-up of chad in machines can prevent voters from dislodging a chad;

that machines need to be cleaned regularly; and that Miami-Dade's machines had not been cleaned in eight years. Trial Tr. III: 441:22-24; 442:22-24; 442:13-16; 443:10; 439:7-17; 440: 4-6; 440: 14-17.

(c) The evidence given by Plaintiffs' statistician that counties using punchcard ballots were five times as likely to have a ballot register as an undervote or blank vote when run through a machine than were counties using optical ballots, and that there was no explanation for this other than differences in machines. Trial Tr. II:183: 17-184:12.

(d) The evidence given by Defendants' statistician that the difference between punchcard ballot and optical ballot results could not be explained by chance and that he was unable to identify any factors other than the characteristics of the machines that fully explained the difference. Trial Tr. III: 354: 14-19;

(e) The testimony of Judge Burton that the Palm Beach Canvassing Board, in actions that the trial court expressly approved, was able to identify a net gain of 215 additional votes for Vice President Gore where the Board could identify the voter's intent but the machine would not register a vote. Trial Tr. II: 278: 8-279:1.

(f) The undisputed evidence that, before the Miami-Dade Canvassing Board prematurely terminated its manual recount, it had (again, by actions the trial court expressly approved) identified 436 additional votes (from 20% of the county's precincts, representing 15% of the votes cast) where the voter's intent was clear but the machine would not register a vote. App. 8; PX 6 (Interrogatory Answers); and

(g) The undisputed evidence that both the Broward County and Miami-Dade County Canvassing Boards were able through manual recounts to identify the voter's intent on between 22% and 26% of the punchcard ballots which the machine had recorded as "no-votes." Trial Tr. II: 188:18-25.

Thus, the undisputed evidence shows that experts from both sides concluded that a manual review of contested ballots was necessary to ascertain the voter's intent; that both sides' statisticians agreed there was a 500% disparity between unregistered votes in counties using punchcard devices compared to counties using optical scanners; and that when unregistered ballots were in fact manually reviewed, county canvassing boards, acting pursuant to standards the trial court approved, were able to find the clear intent of the voters with respect to many hundreds of ballots which the machines did not count.

Plaintiffs' contest is based on five instances where the official results certified involved "receipt of a number of illegal votes" or "rejection

of a number of legal votes” §102.168(3)(c). These are:

- (1) The rejection of 215 net votes for Vice President Gore identified by the Palm Beach Canvassing Board – in a manual count the trial court expressly approved – as reflecting the clear intent of the voter;
- (2) The rejection of 168 net votes for Vice President Gore, identified by the Miami-Dade County Canvassing Board in its partial recount – a recount the trial court expressly approved as proper;
- (3) The receipt and certification after Thanksgiving of the election night returns from Nassau County in place of the statutorily mandated machine recount tabulation—in violation of §102.14—resulting in an additional 51 net votes for Governor Bush;
- (4) The rejection of an additional 3300 votes in Palm Beach County, most of which Democrat observers identified as votes for Vice President Gore but which were not included in the Canvassing Board's certified results; and
- (5) The refusal to review approximately 9000 additional Miami-Dade ballots—the majority of which came from precincts carried by Vice President Gore in the election—which the counting machine registered as non-votes and which have never been manually reviewed.

The November 26, 2000 certified results showed a 537-vote margin in favor of Governor Bush. Reducing that margin by 428 (215 from Palm Beach, 168 from Miami-Dade, and 51 from Nassau) results in a margin of 103 before a single one of the 3300 ballots from Palm Beach or the 9000 ballots from Miami-Dade is examined. All of those ballots were offered and received in evidence and are now in the possession of this Court. Although Plaintiffs' contest is expressly based on the rejection of those ballots, the trial court reached its decision denying the contest without even looking at this evidence.

The trial court's decision to do so was based on three fundamental errors of law. Specifically:

- (1) The trial court held that in an election contest, the court cannot review *only* the contested ballots, but must review *all* ballots cast, or *no* ballots at all —contrary to the plain mandatory language of §102.168; contrary to a consistent line of authority in which this court and lower courts have limited their review to the contested ballots only; and without the citation of any statutory or case authority.
- (2) The trial court held that the county canvassing boards' decisions had to be reviewed for “a clear abuse of discretion” (Ruling Tr. at 10) — contrary to consistent precedents in this and other states that the review of contested ballots is a matter of law for the court's *de novo* review; in the

absence of any reference to discretion in §102.168 (as contrasted to §102.166's grant of discretion to the canvassing boards to decide whether to undertake a sample manual recount); without the citation of any case interpreting §102.168; despite the fact that §102.168 provides for an original judicial proceeding to contest the rejection or receipt of particular ballots; and despite the fact that the 9000 Miami-Dade ballots have never been reviewed, and no “discretion” as to what they mean has ever been exercised.

(3) Finally, the trial court held that the plaintiff must establish a “reasonable probability that the results of the election would have been changed” before it could look at the contested ballots—contrary to the express standard of §101.168(3)(c), requiring only that the inclusion or exclusion of the contested votes “will change *or place in doubt* the result of the election”; and despite the fact that the ballots, which the trial court declined to examine, are the best evidence as to whether the results of the election would change. (Plaintiffs also submit that, whatever the standard necessary to entitle Plaintiffs to a review of ballots, the undisputed evidence at trial more than met that standard.)

This Court and other courts have heard a great deal about 3 U.S.C. §5. To the extent that changing the rules after the election would deprive the State of Florida of the “safe harbor” of that section, the radical departure of the trial court from settled Florida statutory law and precedents would clearly lead to that result. Moreover, to the extent that the 3 U.S.C. §5 implies a prohibition on “changing the rules” after the election, the trial court's departure from settled Florida law would violate federal law.

STATEMENT OF THE CASE AND FACTS

A. Palm Beach County

On November 12, following a sample recount, the Palm Beach Board voted to conduct a manual recount of all ballots cast in Palm Beach County for President and Vice President. Following a legal opinion from the Secretary of State calling into question the validity of manual recounts in vote tabulation, the Palm Beach Board voted to suspend its manual recount.

From November 16 through 26, 2000, the Palm Beach County Board conducted a manual recount of all the presidential votes, under § 102.166(5)(c), Florida Statutes (2000).

During its review of ballots, the Palm Beach Board excluded approximately 3,308 legal votes, including:

- Using a per se rule, ballots where the voter mistakenly voted for one presidential candidate, taped over the wrongly punched chad and then voted for Al Gore were declared overvotes and

not counted. (Tr. Palm Beach County Canvassing Board, 11/19/00, at 66, 75-76, 82, and 84-85)

- A damaged ballot on which the voter wrote in the name of Al Gore for President was declared an overvote and not counted. (Tr. Palm Beach County Board 11/18/00, at 94-97)
- Several ballots were declared undervotes and not counted where, consistent with other races on the ballot, the voter made a pinhole in the chad for Al Gore for President, which did not fully dislodge the chad. PX 35; (Tr. Palm Beach County Board 11/18/00 at 20-21; PX 38 Tr. Palm Beach County Board 11/21/00, at 222-223)
- A ballot was rejected as an undervote where “one corner is definitely detached, and...[a Board member] can see right through it” because the Board said the “policy we adopted before starting was the two-corner...approach.” PX 36 (morning); Tr. Palm Beach County Canvassing Board, 11/19/00, at 72-73

On November 22, 2000, the Palm Beach Board reviewed Judge Labarga's order, and recommenced reviewing ballots on November 24, 2000. Trial Tr. II: 265-268. After hearing evidence as to factors that might lead to partially indented ballots, Judge Burton appears to have acknowledged that the Board had erred up to that point in applying a “clear and convincing” standard in its review up to that point. (PX 40; Tr. Palm Beach County Canvassing Board, 11/24/00, at 45 and Tr. of Hearing before Palm Beach County Circuit Judge Labarga, 11/22/00 at 79) The Palm Beach Board did not revisit the precincts that had been decided under the erroneous standard. (Transcripts of Palm Beach County Canvassing Board, 11/24/00, 11/25/00 and 11/26/00)

On November 26, the Palm Beach Board sought an extension of the mandatory acceptance time for reporting the results of its manual recount, both by telephone and in writing. The Secretary of State refused to extend the mandatory acceptance time. PX 14.

Before the end of the mandatory acceptance period, the Palm Beach Board sent the results of the manual recount that it had completed to Secretary of State Harris and the Election Canvassing Commission. At that time, the Palm Beach Board reported the manual recount results for the

approximately 586 out of 637 precincts in Palm Beach County where it had completed its partial manual count and the unrevised machine recount results for the remaining precincts. There was a net increase of 172 votes for Al Gore over the county's results before the manual recount. (PX 14)

Despite the Secretary's refusal to accept returns beyond the prescribed time, the Palm Beach Board continued with its manual recounts of votes. At 7:07 p.m., just 127 minutes after the mandatory acceptance time, the Palm Beach Board completed its recount. The complete manual recount identified a total additional net 215 votes for Al Gore over the machine recount. App. 3; 4.

On November 26, shortly after 7:30 p.m., Secretary Harris and the Commission certified the results of the election, but rejected the results of the manual recount from Palm Beach County, and instead certified the result of the earlier machine recount in Palm Beach County.

B. Miami-Dade County

After conducting a sample manual recount, the Miami-Dade Canvassing Board voted on November 17 to conduct a full manual recount and commenced it on November 20.

Approximately 10,750 ballots in Miami-Dade County did not register a vote for president on Miami-Dade's Votamatic tabulation machines. Plaintiffs' Exhibit 7, Trial Tr. II: 183. At trial, it was established that this above-average undervote rate was attributable at least in part to unreliable voting machines that were acquired in the 1970's (Trial Tr. II: 418-19, 437-40) and had not been cleaned of chads and other debris for at least eight years. Trial Tr. II:183; App. 7 (Stipulation); Ruling Tr. at 10.

On the morning of November 22, the Miami-Dade Canvassing Board decided, in light of the mandatory acceptance time set by this Court, to focus its manual count on the approximately 10,750 "undervotes", of which approximately 9,000 had not yet been reviewed. Prior to November 22, in two full days of work the board had reviewed all of the ballots from approximately 139 precincts, or approximately 20% of the 617 Miami-Dade precincts, and roughly 15% of the approximately 653,000 ballots cast. Miami-Dade Canv. Bd. Tr. 11/22/00 Pt. I, at 4, 35-37. The Board had found 436 legal votes that the machines had failed to tabulate – 302 votes for Vice President Gore and 134 votes for Governor Bush, for a net gain of 168 votes for Vice President Gore. App. 8; PX 6.

All three board members concurred with conducting a manual recount of just the undervotes. (Miami-Dade Canv. Bd. Tr. 11/22/00 Pt. 1, at 35-37). Unfortunately, within hours, a transformation took place. As

the morning session was concluding, one speaker confronted the canvassing board directly with the reality of accelerating tensions:

There is a full protest going on out in the lobby
and we cannot bring people in or out. We have
people *attempting to get into a fight with officers
or with members of the media.*

Miami-Dade Canv. Bd. Tr. 11/22/00 Pt. 1, at 50 (emphasis added). As another speaker advised the canvassing board, “We were both crushed up against the door.” Miami-Dade Canv. Bd. 11/22/00 T. Pt. 1, at 92. The Board's own intensifying concerns about the potential impact of these disturbances were also stated on the record by Supervisor Leahy. “Until the demonstration stops, nobody can do anything.” Miami-Dade Canv. Bd. Tr. 11/22/00 Pt. 1 at 51.

Following a lunch break on November 23, and without notice of the intention to consider the issue, the Miami-Dade County Canvassing Board announced it would cease all manual counts.

The Canvassing Board also voted to return to the certification of November 8. Miami-Dade Canv. Bd. Tr. 11/22/00 Vol. II at 35-36. This had the effect of discarding the 436 legal votes that had already been duly counted up to that moment. The Miami-Dade Democratic Party appealed to the Third District Court of Appeal, which held that the Canvassing Board had a “mandatory obligation” to complete the manual recount, but that it was physically impossible to meet this Court's deadline. *Miami-Dade Dem. Party v. Miami-Dade Canvassing Commission*, Case No. 3D00-3318 (3rd DCA Nov. 22, 2000).

C. Nassau County

On the evening of November 7, 2000, the Nassau County Supervisor of Elections informed Secretary Harris that unofficial returns of the general election for President in Nassau County showed Gore/Lieberman with 6,952 votes and Bush/Cheney with 16,404 votes. App. 9; PX 54 (Trial Stipulation). On November 8, the Nassau County Canvassing Board conducted the machine recount of ballots mandated by section 102.141(4), Fla. Stat. (2000); App. 9; PX 54. The statutorily mandated machine recount produced returns of 6,879 votes for Gore/Lieberman and 16,280 votes for Bush/Cheney, a loss of 124 votes for Bush/Cheney and a loss of 73 votes for Gore/Lieberman, resulting in a net gain of 51 votes for Gore/Lieberman. App 9; PX 54. On November 8, the Nassau County Canvassing Board faxed its certification reflecting the tabulation based on the statutorily

mandated machine recount. Trial Tr. IV: 587. On November 17, the Canvassing Board submitted an additional certification without changing the machine recount results. PX 17

At a meeting held at 8:30 a.m., on November 24, believing that votes had been missed in the machine recount (solely because the election night returns were higher), without any further investigation, without a manual recount or even a further machine recount, without any protest by anyone authorized by section 102.166 to make a protest, and based on erroneous advice from the Elections Division of the Department of State, the Nassau County Canvassing Board purported to certify to the Department of State the unofficial election night returns (Gore/Lieberman 6,952 votes and Bush/Cheney 16,404 votes) rather than the returns of the statutorily mandated machine recount (6,879 votes for Gore/Lieberman and 16,280 votes for Bush/Cheney). App. 9; PX 54; Trial Tr. Vol IV: 593. The Nassau County Canvassing Board transmitted its new certification to the Department of State on Friday November 24. PX 54; App. 9; Trial Tr. IV 574-576; 581-592.

D. Elections Canvassing Commission Certification

On November 26, the Elections Canvassing Commission certified the results of the November 7th Presidential Election. PX 1. The results were certified without the results of the completed (or partial) Palm Beach County manual count, without the results of the partial manual count in Miami-Dade County, without additional untabulated votes in Miami-Dade County, and without the results of the statutorily

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO DECIDE THIS CASE.

There is no doubt that the trial court's order addresses a question of great public importance, and this appeal requires immediate resolution by this Court. The trial court's decision not to count disputed ballots in this election contest directly affects the validity of Florida's election. The decision whether the trial court erred in failing to count the disputed ballots may determine which candidate was elected President of the United States. It is difficult to imagine a case raising a question of greater public importance.

Further, it cannot be disputed that this case requires immediate resolution. Failure to quickly review the trial court's ruling can result in the

selection of Florida's presidential electors not being given deference by Congress under 3 U.S.C. § 5. Moreover, if this Court determines that the trial court erred below, this Court must fashion a remedy that will fit within the limited time available.

Finally, in the past, this Court has exercised its discretionary jurisdiction under Article V, section 3(b)(5) to review a trial court's opinion in election cases. *See Palm Beach Canvassing Board v. Harris, et al.*, Case No. SC00-2346 (Fla. Nov. 21, 2000), *vacated and remanded by Bush v. Palm Beach County Canvassing Board*, 2000 U.S. LEXIS 8087 (U.S. Dec. 4, 2000); *Beckstrom v. Voulisia County Canvassing Board, et al.*, 707 So.2d 720 (Fla. 1998); *Harden v. Garrett*, 483 So.2d 409 (Fla. 1985); and *McPherson v. Flynn*, 397 So.2d 665 (Fla. 1981).

II. THE APPEAL PRESENTS QUESTIONS OF LAW, NOT FACT.

This appeal presents issues of laws not fact. Accordingly, the standard of review is de novo. The determinative facts in this matter come from documents, not witnesses. Unfortunately the most important documents are the ones the trial judge refused to look at, even though he admitted them into evidence: the nearly 14,000 ballots now in the custody of this Court. On such matters, the trial court's perspective and knowledge is entitled to no deference from this Court. *See, e.g., Schweinberg v. Click*, 627 So. 2d 548 (Fla. 5th DCA 1993); *Hillsborough County v. Kortum*, 585 So. 2d 1029 (Fla. 2nd DCA 1991); *Wheeler v. State*, 472 So. 2d 847 (Fla. 1st DCA 1985); *Hicks v. United States*, 368 F. 626 (4th Cir. 1966).

III. THE VOTE TOTALS MUST BE REVISED BECAUSE THEY ARE BASED ON THE “REJECTION OF A NUMBER OF LEGAL VOTES SUFFICIENT TO CHANGE OR PLACE IN DOUBT THE RESULT OF THE ELECTION.”

A. THE LEGAL VOTES ALREADY IDENTIFIED BY THE PALM BEACH COUNTY CANVASSING BOARD MUST BE INCLUDED IN THE VOTE TOTALS.

In the course of its manual recount, the Palm Beach County Canvassing Board identified a net gain of 215 additional votes for Vice President Gore. *See App. 3 (Answer of Palm Beach Canvassing Bd.); App. 4 (Trial Testimony of Judge Burton).* The Elections Canvassing Commission did not include these votes in the certified vote totals. PX 1.

Trial Tr. III: 52-53; App. 3.

Defendants have conceded that these votes are legal. Tr. 11/28/00 p. 44: 9-12 (Statement of Barry Richard: “We believe the [Palm Beach] Canvassing Board acted within its discretion and within order [sic] of Judge Labarga, so we have not challenged what they did.”). Exclusion of these lawful votes is thus a clear violation of Section 102.168(3)(c), which bars “rejection of . . . legal votes.” The trial court also found that the Palm Beach Board acted properly in its manual review of these 215 ballots (Ruling Tr. at 10).

B. THE LEGAL VOTES ALREADY IDENTIFIED BY THE MIAMI-DADE COUNTY CANVASSING BOARD MUST BE INCLUDED IN THE VOTE TOTALS.

As of the time the Board ceased its manual count, it had identified an additional 436 lawful votes: 302 for Vice President Gore and 134 for Governor Bush. App. 8; PX 6, attachment 1.

There can be no doubt that these are “legal votes” that would “change or place in doubt the result of the election.” Section 102.168(3)(c).

Accordingly, the votes must be added to the certified vote totals.

Significantly, the Circuit Court did not dispute that these are legal votes or that the standard applied by the Miami-Dade Canvassing Board was in any way improper. Indeed, it upheld the Miami-Dade Canvassing Board's determinations with respect to the ballots. App. 8; PX 6. Moreover, the Secretary of State certified results of a partial manual recount using the Miami-Dade standard when she certified the six additional votes from the three precincts sampled by the Miami-Dade Board. PX 1; App. 8.

The Circuit Court held the 436 votes tabulated during the partial manual recount should not be included because it believed that Florida law bars the inclusion in the Elections Canvassing Commission's certification of the results of a recount of less than all of a county's ballots. Ruling Tr. at 10. This determination is plainly incorrect. It again confuses the statutes that govern the Commission's certification and the laws that govern a post-certification Section 102.168 contest.

Nothing in Section 102.168 provides that legal votes may be recognized only if they were identified in county-wide recounts. Indeed, it is well established that the addition of legal votes to certified totals without conducting a district-wide recount is required. *See, e.g., State ex rel. J.R. Carpenter v. J.K. Bake*, 198 So. 49 (Fla. 1940). For these reasons, these additional 436 votes – a net increase

of 168 for Vice President Gore – must be added to the vote tabulation.

IV. THE VOTE TOTALS FROM NASSAU COUNTY MUST BE REVISED TO REFLECT THE TOTALS THAT THE CANVASSING BOARD WAS LEGALLY REQUIRED TO SUBMIT TO THE ELECTIONS CANVASSING COMMISSION.

Because of the closeness of the election, there was a statutorily mandated machine recount pursuant to Section 102.141(4), which states that when the election night returns “reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office,” the responsible canvassing board “shall order a recount.” §102.141(4). The statute provides:

If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

§ 102.141(4) (emphasis added).

The Nassau County Canvassing Board plainly violated this statutory command. As discussed above, there was a discrepancy between the initial returns and the recount results, but Nassau County – after initially submitting the statutorily required recount results – subsequently substituted a certificate setting forth the initial results. App. 9; PX 1. That clear violation of Florida law must be corrected by this Court.

The plain terms of Section 102.141(4) obliged the Nassau County Canvassing Board to certify to the Secretary of State the results of the tabulation of the ballots determined in the statutorily-mandated recount. The Board's November 24th revised certification reverting to the election night returns plainly violated the statutory requirement. The Circuit Court stated that the Nassau County Board “did not abuse its discretion in its certification of Nassau County's voting results. Such actions were not void or illegal, and it was done within the proper exercise of its discretion upon adequate and reasonable public notice.” Ruling Tr. at 12. But the statute confers no discretion whatever upon a canvassing board in this situation: the Board must certify the recount results. See *Morse v. The Dade County Canvassing Board*, 456 So.2d 1314 (Fla. 3rd DCA, 1984) (holding that tabulation is presumed correct). The Circuit Court's conclusory assertion cannot be squared with the plain language of the governing

statute and should therefore be reversed by this Court.

V. This Court should order the immediate counting of the 9,000 BALLOTS from Miami-dade county and THE 3,300 disputed VOTES IN PALM BEACH COUNTY AND the inclusion of ALL LEGAL votes in the vote totals

In light of the razor-thin margin separating the candidates, and the undisputed evidence that hundreds of legal votes were present in uncounted ballots, the Circuit Court's refusal to examine any of the nearly 13,000 disputed ballots taken into evidence in this case, to determine whether they included any legal votes, is error.

The Circuit Court's decision to ignore these votes rested on three flawed conclusions of law: (1) that a court in an election contest may not review only the contested ballots but rather must review all ballots cast for the office – or none at all; (2) that the issue in a contest action is whether the county canvassing board abused its discretion; and (3) that a plaintiff must establish a “reasonable probability that the results of the election would have been changed” before the court may review the contested ballots. When these errors are set aside, it is clear that the ballots must be reviewed by this Court for a determination of how many legal votes were excluded from the vote totals.

Judicial review of ballots to identify legal votes is not a novel or unusual remedy under Florida's election contest law. It has been invoked for decades in this State. Plaintiffs' contest arises under 102.168(3)(c): the “rejection of a number of legal votes sufficient to change or place in doubt the result of the election.” The Florida Legislature provided courts with broad authority to determine how best to investigate and consider the merits of such an election contest claim:

“The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.” Section 102.168(8) (emphasis added).

As this Court held long ago in *State ex rel. Nuccio v. Williams*, 97 Fla. 159, 171, 120 So. 310, 314 (1929), issues about “the legality of the vote [are] for judicial determination, if duly presented in appropriate proceedings.” Whether a voter has sufficiently indicated an intent to vote for a particular candidate “is ultimately a judicial question,” and is “subject to judicial procedure in which the courts may determine whether the vote . . . should be

counted.” *Id.*

This commonsense conclusion is confirmed by the numerous cases in which – *prior to entering final judgment* -- courts have performed a ballot-by-ballot review in a contest action. In *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 722 (Fla. 1998), this Court compellingly validated that obligation with the manual count of the disputed ballots -- in that case, over 8,000 absentee ballots. In *Beckstrom*, “appellant moved the court to order a manual recount of the absentee ballots. The court granted the motion, and the clerk of the circuit court conducted a re-count, which was observed by representatives for both candidates.” *Beckstrom*, 707 So. 2d at 722.

A. The Trial Court Erred in Holding That Florida Law Restricts The Remedy In a Contest Action To A Statewide Recount.

Plaintiffs are not aware of a single Florida case in which a court has held that it was required to review any ballots other than those contested by the plaintiff in the contest action – and neither the Circuit Court nor Defendants have cited *any* authority for that proposition. Indeed, numerous Florida cases specifically state that the court's reviewed only the ballots contested by the plaintiff. For example, in *Beckstrom*, the trial court ordered the recount of only the challenged ballots, not all of the ballots cast in the election. Similarly, in other Florida election contest cases the trial court has counted only the disputed ballots. *See In re The Matter of the Protest Election Returns and Absentee Ballots in the November 4, 1997, Election for the City of Miami*, 707 So.2d 1170 (Fla. 3rd DCA 1998)(focusing only on absentee ballots in an election contest challenging fraud in the absentee ballots); *Spradley v. Bailey*, 292 So.2d 27 (Fla. 1st DCA 1974)(focusing only on the absentee ballots where the facts showed illegal absentee ballots); *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975)(focusing only on the disputed irregularities or errors in the absentee ballots).

Moreover, such an approach would be wholly inconsistent with the legal principle underlying the contest actions, which by its terms allows plaintiffs to contest the election by identifying specified flaws in the process and bringing those matters before the court for prompt resolution; here, “[r]eceipt of a number of illegal votes or rejection of a number of legal votes.” There is no basis at all for construing that statute – which emphasizes the need for expeditious consideration (see Section 102.168(7) (“immediate hearing”) and flexible relief – to impose such an enormous

burden on plaintiffs and defendants, as well as on the court required to review the ballots that are not the subject of plaintiff's contest.

The Circuit Court relied on Judge Klein's dissenting opinion in the *Fladell v. Palm Beach Canvassing Board*, Case nos. 4D00-4145, 4D00-4146, and 4D00-4153 (Fla. 4th DCA Nov. 27, 2000), for the proposition that the Appellants had to seek a state-wide recount. In addition to the fact that the opinion is a dissent, it is also irrelevant because it relates to the propriety of a revote – not judicial review of contested ballots -- and purports to distinguish *Beckstrom* on the ground that the case did not involve a revote. The *Fladell* dissent thus by its own terms makes clear that its reasoning would not apply to the area addressed in *Beckstrom*, judicial review of contested ballots. In sum, there is no authority whatever for the trial court's assertion that judicial review was required to extend beyond the ballots contested by Plaintiffs.

B. The Trial Court Erred in Failing to Make Its Determinations De Novo And Instead Reviewing the Actions of The County Canvassing Boards Only for a “Clear Abuse of Discretion.”

Section 102.168 and settled precedent make clear that a court engages in de novo review of the issues brought before it in a contest action. A certification of election “may be contested in the circuit court” § 102.168(1), Fla. Stat. (2000). The action begins with a complaint. § 102.168(2), Fla. Stat. (2000). Defendants must be served and must serve answers. § 102.168(6), Fla. Stat. (2000). An election contest is clearly an original action before the circuit court – not some sort of appellate review of the Canvassing Board's decisions. As in any such action, the court must make the initial decision.

While one ground for an election contest is an error or misconduct by members of the canvassing board, *see, e.g.*, §§102.168(3)(a), (d), Fla. Stat. (2000), the statute also authorizes a challenge based on “[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election” § 102.168(3)(c). This provision requires only proof that a potentially decisive number of valid votes were not counted, and focuses solely on the votes themselves; it neither calls for “review” of the Canvassing Board's decisions, nor suggests that the Board's decisions might be owed any deference.

As this Court held in *State v. Williams*, 97 Fla. 159, 120 So. 310, 314

(Fla. 1929) (emphasis added, internal citation omitted):

[T]he inspectors should count and return the vote and ballot as cast whatever may be the name or the mark used, *the legality of the vote being for judicial determination, if duly presented in appropriate proceedings. . . . What is a substantial compliance with the requirements of the statute is ultimately a judicial question*

[I]rregular votes should be separately counted, tabulated, and returned, *and the ballots should be duly preserved, subject to judicial procedure in which the courts may determine whether the vote so irregularly cast should be counted with those that were properly and regularly cast.*

See also Wiggins v. State, 106 Fla. 793, 144 So. 62 (Fla. 1932) (“ultimately a judicial question.”); *Nuccio v. Williams*, 97 Fla. 159, 120 So. 310, 314 (Fla. 1929) (“legal effect of votes is for judicial determination.”)

Just as the test for determining voter intent is a judicial question, so too application of that test to particular ballots must be a judicial action. In adjudicating a contest action, the court reviews the ballots themselves, not the canvassing board's assessment of the ballots. The ballots themselves are “the best evidence of how the electors voted, and such ballots may be examined by the court as original evidence, when necessary to verify the accuracy of the returns.” *State v. Smith*, 107 Fla. 134, 144 So. 333, 336 (Fla. 1932) (emphasis added). Indeed, the fact that cases such as *Smith*, *Nuccio*, and *Wiggins* – which compel the judicial review of ballots through mandamus – further confirms the premise that there is no discretion under section 102.168 to allow legal votes to be discarded. *See also Carpenter v. Barber*, 144 Fla. 159, 198 So. 49 (1940).

The Circuit Court rejected Appellants' request for a manual count of the ballots in part on the ground that “[a]ll cases upon which plaintiffs rely were rendered upon mandamus prior to the modern statutory election system and remedial scheme enacted by the legislature of the state of Florida in section 102 of the Florida statute, or chapter 102 of the Florida statutes.” Ruling Tr. at 10. But that simply is not accurate. *Beckstrom*, decided by this Court in 1998, is the preeminent example of a case brought when the modern statutory scheme was in effect and in which Court approved a manual review of ballots by the circuit court to determine voter intent.

Nor is there any basis for the implication that, the Legislature's adoption of a statutory contest procedure somehow revoked or limited the long-established authority of a court to review ballots *de novo* in a

contest action. On the contrary, the provisions of section 102.168 would require a judicial determination even if abuse of discretion had been the standard in mandamus proceedings.

The continuing power of courts to count the ballots was confirmed in 1999 when the Legislature eliminated the right of a candidate to bring a protest action in court, consolidating a candidate's rights to judicial review of election results into the Section 102.168 contest procedures. At that time, the legislature made the broad remedial powers of the court under section 102.168 explicit by moving the provision authorizing the court to “fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances,” formerly part of the Section 102.166 protest provision, to Section 102.168(11), the judicially-supervised contest action. *See* Laws of Florida, Ch. 99-339 (1999). And the legislative history confirms that the legislature did not intend to eliminate the courts' power to issue, and candidate's right to request, a count of disputed ballots under writ of mandamus. *See* The Final Analysis by the House Committee on Election Reform at 5-8 (the bill does not “create, increase or reduce, either directly or indirectly,” any “authority to make rules or adjudicate disputes,” and discussing the power of courts in election contests “to compel a recount of the ballots cast in an election”). There is no basis to assert that the Legislature intended to revoke the Court's right to count contested ballots on its own motion or upon issuance of writ of mandamus.

In sum, there can be no doubt that the courts retain broad authority – and a statutory responsibility – to exercise de novo review of contested ballots in actions under Section 102.168. The trial court's ruling to the contrary is erroneous as a matter of law.

C. The Trial Court Erred Holding that Plaintiff Must Establish A “Reasonable Probability That The Results Of The Election Would Be Changed” Before A Court Reviews Contested Ballots.

The most important pieces of evidence in this case – the 13,000 contested ballots -- have never been reviewed. The trial court's decision not to review these ballots was wrong as a matter of law.

1. No Additional Factual Showing Is Needed To Obtain Judicial Review of Contested Ballots Introduced Into Evidence

The Circuit Court refused to review the contested ballots because plaintiffs did not “establish[] . . . a reasonable probability that the statewide election result would be different.” Ruling Tr. at 10. That holding imposes a standard that actually is higher than plaintiffs' burden for prevailing on the merits: the statute simply requires a plaintiff to establish “rejection of legal votes sufficient to change or *place in doubt* the result of the election.” Section 102.168(3)(c)(emphasis added); see also *Beckstrom*, 707 So. 2d at 725 (“if a court finds substantial noncompliance with statutory election procedures and also makes a factual determination that reasonable doubt exists as to whether a certified election reflected the will of the voters, then the court in an election contest . . . is to void the contested election even in the absence of fraud or intentional wrongdoing.”)

Moreover, plaintiffs are not required to prove their case before the evidence (i.e., the ballots) are considered. The ballots *are* the proof. Prior cases make clear that the courts' review of the ballots was conducted *prior* to the entry of judgment and *prior* to any finding that the plaintiff was entitled to prevail. See *Hornsby v. Hilliard*, 189 So.2d 361 (Fla. 1966); *Protest of Election Returns by Marlene Young*, Case No. G96-2984 (Cir. Court for Polk County, Dec. 1996); cf., *Pullen v. Mulligan*, 138 Ill. 2d 21 (Ill. 1990); *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996). The absence of a need for such a showing by the plaintiff is most obvious in those cases in which the trial court reviewed the ballots, but later ruled against the plaintiff. See, e.g., *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (Fla. 1998); *Boardman v. Esteva*, 323 So.2d 259 (Mass. 1975). The cases thus make clear that a decision in plaintiff's favor is not a necessary prerequisite to judicial review of the ballots.

This result accords with common sense. How could the plaintiff be required to prove the entire case before the trial court examines what this Court has characterized as the “best evidence”? *State v. Smith*, 107 Fla. 134, 144 So. 333, 336 (Fla. 1932). It simply cannot be the case that a candidate must prove his or her claim in order to get access to the very evidence needed to prove that case.

An example illustrates the illogic of this approach. Assume a still-sealed box known to contain 1000 ballots was discovered after the results of the election were certified. If a proper party filed a contest action because the two candidates were separated by just 500 votes, he or she would have no way of knowing how the ballots in the sealed box would affect the result of the election. Under the Circuit Court's construction of the statute, that would mean that the ballots could never be reviewed by the court. Yet such a result would frustrate the

purpose of the contest statute itself: to ensure that the election results reflect the will of the voters. *See, e.g., Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975).

The approach we urge is also consistent with the usual rules in judicial proceedings. Contested ballots were introduced into evidence in this case. Surely a trier of fact cannot close his or her eyes to the most probative evidence in a case. Here, the ballots are the “best evidence” (*Smith, supra*) and were required to be reviewed by the court.

2. Even If, Contrary To Plaintiffs' Submission, Some Threshold Related To The Plaintiffs' Chances Of Prevailing On The Merits Is Required To Obtain Judicial Review Of Contested Ballots, That Requirement Is Satisfied Here.

Even if this Court were to conclude, contrary to our submission, that some threshold showing by plaintiffs is required to obtain judicial review of contested ballots, any such threshold was met here. This is especially true because the statute itself authorizes the court to take steps necessary to ensure that “each allegation in the complaint is investigated, examined, or checked.” Section 102.168(8).

As demonstrated above, when the certified vote totals are adjusted to account for the legal votes in Palm Beach and Miami-Dade Counties and to remedy the unlawful action of the Nassau County Canvassing Board, 0.0018% of the total votes cast in Florida separates the two major party candidates for President. That small margin is, in and of itself, sufficient to place in doubt the results of the election and require a count of the disputed ballots. *Cf. State ex rel. Whitley v. Rinehart*, 140 Fla. 645, 192 So. 819 (1940).

Plaintiffs did not, however, rest their case solely upon the closeness of the result. They introduced substantial evidence, much of it undisputed, establishing that the results of this election are in doubt and that a count of the contested ballots will affect, or place in doubt, those results. For example:

Plaintiffs proved that the technology used to record votes in Miami-Dade and Palm Beach County – punchcards – is sufficiently unreliable that in a close election a manual count of the ballots is necessary.

The trial court explicitly credited this evidence finding that there was “voter error, and/or less than total accuracy, in regard to the

punchcard voting devices utilized in Dade and Palm Beach Counties, which these counties have been aware of for many years.” (Ruling Tr. at 10)

Second, plaintiffs proved that it is possible to review punchcard ballots that the machines could not count and, in many instances, determine for whom the voter intended to vote in the Presidential election.

Third, in *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board*, Case No. 3D00-3318 (3rd DCA November 22, 2000), the appellate court concluded that the sample manual recount in Miami-Dade County revealed “an error in the vote tabulation which could effect the outcome of the election.” Slip op. at 2-3.

Plaintiffs also proved that the 3,300 ballots reviewed by the Palm Beach County Canvassing Board and contested by Plaintiffs must be reviewed by the Court:

(a) According to the testimony of Judge Burton, a number of ballots that, as a matter of law, should have been counted as votes because they evidenced the intent of the voter were rejected because of per se exclusionary rules employed by one or more members of the Board. (Trial Tr. Vol. III, pp. 30-34.)

(b) Palm Beach Circuit Court Judge Jorge Labarga subsequently ruled that “a per se exclusion of any ballot that does not have a partially punched or hanging chad is not in compliance with the intention of the voter standard. In a written order on November 22, 2000, the Court reiterated its ruling that the Board could not apply rigid rules that would result in the rejection of validly marked ballots. Following Judge Labarga's second ruling, the Board recommenced reviewing ballots on November 24, 2000. After hearing evidence as to factors that might cause partially indented ballots, Judge Burton acknowledged that the Board had erred up to that point in applying a “clear and convincing” standard in its review up to that point. (See Tr. of Palm Beach Canvassing Board, November 24, p. 45.) However, the Board did not reexamine the precincts that had been decided under the erroneous standard. (Transcripts, November 24-26).

Plaintiffs bolstered their request to review the evidence of the ballots with data and statistical analysis showing that Vice President Gore is likely to obtain a net increase of over 400-800 votes if the contested ballots in Palm Beach County are reviewed using the standards for determining the intent of the voter previously established by this Court. While the statistical analysis may not establish to a certainty what the outcome of reviewing the ballots would be, they provide

further compelling support for the proposition that the Court should require such a review – the only means of determining the actual results of this election.

**D. THE COURT SHOULD ORDER THAT THE BALLOTS
BE COUNTED BY A JUDICIAL OFFICIAL UNDER
THIS COURT'S AUSPICES**

In view of the exigencies of time, as we discuss below, this Court should order that the ballots be reviewed under its auspices. In order to eliminate any uncertainty regarding the process of reviewing the ballots, it is appropriate for this Court to specify the standard to be applied in the review of those ballots.

The law of Florida is that punchcard votes must be counted according to an objective standard that looks to the intent of each voter as expressed in the marking of the ballot. Only three weeks ago, this Court stated:

“Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law”

Palm Beach County Canvassing Board v. Katherine Harris, 2000 WL 1725501 (Fla. Nov. 21, 2000), quoting *Pullen v. Mulligan*, 561 N.E. 2d 585, 611 (Ill. 1990) (citations omitted).

This was not a new rule of law in Florida. For more than 80 years this Court has adhered to this very standard for adjudging ballots. *See, e.g., Darby v. State*, 73 Fla. 922, 924, 75 So. 411, 413 (Fla. 1917). The purpose of the standard is expressed in this Court's longstanding doctrine that the voters of this state are “possessed of the ultimate interest and it is they to whom we must give primary consideration.” *Boardman v. Esteve*, 323 So.2d 259, 263 (Fla. 1975). Florida's election code also makes the objective intent standard luminously clear. Section 101.5614(5) provides: “No vote shall be declared invalid or void if there is a clear indication of the intent of the voter” Subsection (6) of the same section states the corollary: “if it is impossible to determine the elector's choice, the elector's ballot shall not be counted for that office” This provision is most telling. Only the *impossibility* of determining the voter's choice justifies rejecting a ballot. The manual recount statute itself provides that counting teams are to manually examine

punchcard ballots “to determine a voter's intent” and if they are unable to do so “the ballot shall be presented to the county canvassing board for it to determine the voter's intent.” '102.166(7)(b), Fla. Stat. (2000). This is the standard adopted by Circuit Judge Jorge Labarga in *Florida Democratic Party v. Palm Beach County Canvassing Board*, Case No. CL 00-11078 AB, Nov. 22, 2000.

This Court, as all these other state courts and legislatures have decided, should affirm that a failure to count indented ballots as votes would improperly disregard voter intent. Courts properly reject the unwarranted and fanciful contention that “many voters started to express a preference in the . . . contest, made an impression on a punch card, but pulled the stylus back because they really did not want to express a choice on that contest.” *Delahunt*, 423 Mass. at 733, 671 N.E.2d at 1243.

**VI. THE DECISION BELOW INFRINGED ON THE
LEGISLATURE'S POWER UNDER THE U.S.
CONSTITUTION; AFFIRMANCE OF THAT RULING
MIGHT STRIP FLORIDA'S ELECTORS OF THE
PROTECTION OF 3 U.S.C. §5**

The U.S. Supreme Court's recent decision in *Bush v. Palm Beach County Canvassing Board*, 2000 Lexis 8087 (Dec. 4, 2000) (per curiam), provides another basis for reversal of the ruling below. As detailed above, the Circuit Court's separate legal rulings are erroneous on their own terms; but viewed together they effect a breathtaking change in that remedy, creating a cause of action dramatically different – and far, far narrower – than the one enacted by the Florida Legislature.

Defendants have emphasized throughout this litigation that Article II, Section 1, Clause 2 of the United States Constitution grants to state legislatures the authority to “direct” the “manner” for the appointment of electors. But the Circuit Court's novel, and unjustifiably cramped, rewriting of Section 102.168 – not a mere interpretation of the statute, but a judicial overhaul of that process – constitutes just the sort of free-form judicial decision making that defendants have warned of, intruding on the State Legislature's authority to fashion the rules governing the selection of Presidential electors in violation of Article II. *Cf. Bush, supra*, at 7. And given that these holdings represent a radical departure from the scheme in place on election day,

acceptance by this Court of these holdings could result in this state's electors being stripped of the protection found in 3 U.S.C. §5, because the method for resolving disputes surrounding the appointment of those electors may turn out NOT to have been resolved "by laws enacted prior to the day fixed for the appointment of the electors." *See* 3 U.S.C. §5; *cf. Bush, supra, at 7.*

VII. THIS COURT SHOULD ITSELF SUPERVISE THE FURTHER PROCEEDINGS IN THIS CASE PURSUANT TO ITS ALL WRITS AND MANDAMUS AUTHORITY

This cause comes before the court as an appeal of a final order. Petitioners ask the Court to also accept their brief as an original action within the All Writs jurisdiction of Article V of the Florida Constitution. That Article vests this Court with the broad authority to "issue writs of mandamus and quo warranto to state officers and state agencies," *Id.* § 3(b)(8), and to "issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction," *Id.* § 3(b)(7).

Time is of the essence in this matter. This contest action must be resolved quickly to prevent "precluding Florida voters from participating fully in the federal electoral process." *Harris*, 2000 Fla. LEXIS * 48; *see also* 3 U.S.C. § 5. If the office at issue was not the Presidency and if the federal statutory mandatory acceptance time did not exist, delaying ballot counting until after all other issues are resolved would not be such irremediable and egregious error. The dispute could even be resolved after the official took office because a Judgment of Ouster is an available remedy. §102.1682, Fla. Stat. (2000).

Petitioners have striven mightily to expedite this proceeding; respondents have engaged in a legal strategy aimed at delay. Twice petitioners moved in circuit court to begin the ballot review. (V. I, pp. 33-39; I, 63-70; I, 109-115) Each time they were rebuffed. They sought appellate review of the decision. *Gore v. Harris*, Case No. 1D00-4717 (1st D.C.A. Dec. 1, 2000). The judge's refusal to even enter an order reflecting his ruling frustrated review. *Gore v. Harris*, Case No. 1D00-4717 (1st Dist. Ct. of Appeal Dec. 1, 2000). They also asked this court to issue a Writ of Mandamus to compel counting. This Court declined without prejudice to the right to seek the relief later. *Gore v. Harris*, Case No. SC00-2385, (Fla. Dec. 1, 2000).

Now is the last chance for a legal judgment to be rendered in this

case. In but a few more days, only the judgment of history will be left to fall upon a system where deliberate obstruction has succeeded in achieving delay – and where further delays risk succeeding in handing democracy a defeat.

This Court should exercise its original jurisdiction in one of two possible respects.

First, should the Court not be prepared to enter judgment for the petitioners – and instead, have under consideration a remand to the trial court -- it should instead consider asserting its original jurisdiction over this matter, and adjudicating all remaining issues and disputes, so as to promptly bring a full and final resolution to this case.

The alternative – reversing the decision below, and remanding the case for further proceedings – risks defeating any hope of a meaningful remedy by seeing the clock run out during the remand proceeding, particularly if post-remand appellate review is required. Alternatively, petitioners seek a writ of mandamus or other writ to immediately commence counting the contested ballots under the supervision of this Court, while the remaining issues are remanded to the trial court for its resolution. They ask this Court to count the ballots itself, or to order that the ballots be counted by appropriate judicial officers designated by the Court under its direct supervision. Under this approach, this Court would not take over the entire action – it would simply count the ballots so that effective relief will not be precluded. In *State ex rel. Peacock v. Latham*, 125 Fla. 793, 803-04, 170 So. 475, 479 (1936), this Court held that it had jurisdiction to itself count the votes and correct the vote count by mandamus even during the pendency of a circuit court review of contest claims. This Court should issue its Writ causing the immediate counting of the ballots by the Court (or its designee). It can do so without prejudice to the question of whether such tabulated votes should be added to the legal vote tallies. Such tabulation could be done by the Clerk of this Court, *cf.*, *Beckstrom*, 707 So.2d at 722, or by judges of the Circuit Court of Leon County.

To delay counting will frustrate the statutory election contest scheme and this Court's November 21, 2000 Order. “Part of the purpose of the protest and contest provisions of the election code is to effect a speedy resolution of such conflicts, with minimal disruption of the electoral process.” *Adams v. Canvassing Board of Broward County*, 421 So. 2d 34, 35 (Fla. 4th DCA 1982). *See also McPherson v. Flynn*, 397 So. 2d 665, 668

(Fla. 1981) (the central purpose of Section 102.168 is ensuring prompt and effective adjudication of conflicts as to balloting and counting procedures). This Court should expedite the counting to ensure prompt completion of the contest without risking disruption of the electoral process.

CONCLUSION

For the reasons stated above, petitioners hereby urge the Court to reverse the decision below. If this State's contest provision is to have any meaning, the meaning must be this: it is a mechanism for determining whether state authorities have certified the wrong candidate as the winner of the election. This case, unlike many other election contests, does not involve a dispute over election technicalities or formalities. Rather, it involves the most fundamental question an election can pose: Which candidate got more votes?

In this action, the contest statute requires that “any relief appropriate under such circumstances” be provided. Fla. Stat. 102.168(8) (2000). Here, petitioners respectfully suggest that the following relief is appropriate:

1. Addition to the certified total of a net gain of 215 votes for Al Gore from Palm Beach County;
2. Addition to the certified total of the 436 votes (a net gain of 168 for Al Gore) in the Miami-Dade manual count;
3. Reinstatement of the previously certified total from Nassau County, in lieu of its adoption of a previously rejected total;
4. Order a tabulation of the approximately 9000 uncounted votes from Miami-Dade county, and a tabulation of the approximately 3300 miscounted votes from Palm Beach County:
 - a. Pursuant to the voter intent standard, as indicated above;
 - b. To be conducted by an appropriate officer designated by this Court, such as the Clerk of this Court; or one or more Circuit Court judges in Leon County; or the Clerk of the Circuit Court;
 - c. To permit that those directing the count employ sufficient resources to complete the count in advance of December 12, 2000.
5. Reject any counterclaims or defenses proffered by the appellees;
6. Upon completion of the tabulation proposed above, should the results

of that tabulation, when combined with any judgments rendered on petitioners' behalf on the issues identified above, indicate that Al Gore and Joe Lieberman did indeed receive more votes for President and Vice President than did George Bush and Dick Cheney, this Court should enter final judgment for the petitioners:

- a. Declaring the Election Canvassing Commission's certification of November 26th null and void, and directing that Commission to certify that Al Gore and Joe Lieberman as the victorious candidates in the Presidential and Vice Presidential election;
- b. Directing the Secretary of State, pursuant to the above, to "certify as elected the presidential electors of" Al Gore and Joe Lieberman, under Sec. 113.011;
- c. Providing such other relief, injunctive and declarative, as is appropriate to effectuate this Court's judgment;
- d. Or, in the alternative, remanding this case for further proceedings consistent with this Court's decision.

In the alternative, given the shortness of time and the importance of this proceeding, should the Court not be prepared to render final judgment for petitioners and instead be inclined to remand to the trial court, petitioners respectfully suggest that – in lieu of such a remand -- this Court exercise its original jurisdiction to:

- Adjudicate all remaining disputes in this matter – obviating the need for remand and possibly another set of appeals after a post-remand proceeding; or
- Direct and supervise the tabulation of contested ballots from Miami-Dade and Palm Beach Counties, while permitting further proceedings, on remand, before the Circuit Court.

RESPECTFULLY SUBMITTED ON THIS ____ DAY OF DECEMBER 2000.

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December 6, 2000

Brief of George W. Bush & Dick Cheney

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

ALBERT GORE, Jr., Nominee of the Democratic Party of the
United States for President of the United States, *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE
STATE OF FLORIDA, *et al.*,

Appellees.

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[TO COME]

STATEMENT REGARDING DISCRETIONARY JURISDICTION

In its December 5, 2000 Order, this Court instructed the parties to brief “the issue of this Court’s exercising its discretion to accept this case.” In Appellee’s view, the best exercise of this Court’s discretion would be *not* to accept this case.

Under Article V, Section 3(b)(5) of the Florida Constitution, this Court “[m]ay review any order or judgment of a trial court . . . certified by the District Court of Appeal . . . to be of great public importance, or to have a great effect on the proper administration of justice throughout the state” Whether to accept a certified case, however, is within the full discretion of this Court; the fact that a case may be of great interest or importance does not require this Court to exercise its jurisdiction.¹ See *State v. Cruz*, 189 So. 2d 882 (Fla. 1966); *Stein v. Darby*, 134 So. 2d 232 (Fla. 1961).

Here, the Court and the public would be better served if this Court declines to accept this appeal. None could doubt that this case is of great public interest, or

¹Of course, the Court should distinguish between matters of great public *interest* and matters of great public *importance*. In 1980, Florida Constitution was amended to restrict the Court’s discretionary jurisdiction to matters of “great public importance,” Art. V, §3(b)(5), Fla. Const., Am. S.J.R. 20C, 1979, adopted 1980. “Importance,” in this context, should be read to mean the importance of the underlying *legal* issues to be resolved, not simply the importance of the parties or the outcome in a particular case. Here, the principal legal issue implicated in this appeal – the appropriateness of the abuse of discretion standard for assessing decisions of county canvassing boards – is a matter of long-settled and heretofore unquestioned Florida law.

even that its ultimate resolution is of great importance to Florida and to the nation. But that interest would be frustrated, not furthered, by prolonging these legal proceedings in this presidential election.

In the instant proceeding, the Leon County Circuit Court, on a greatly accelerated timeframe, held an extensive trial and heard evidence, expert testimony, and extended legal argument. Each side was given the full opportunity to present its case. Following that hearing, the Circuit Court for Leon County rejected Vice President Gore's contest of the 2000 presidential election.

In so doing, the Circuit Court carefully reviewed each of Vice President Gore's claims and concluded, *inter alia*, that Appellants' evidence was insufficient to meet their legal burden, that their witnesses were not credible, and that the County Canvassing Boards did not abuse their sound and duly conferred discretion in resolving the issues in this election.

If this Court declines to review that thorough and factbound determination (or, alternatively, if this Court summarily affirms its conclusion), the public interest will be served in three important respects:

First, it will allow this extended election process to come to a close, and allow the public to put to rest the attendant uncertainty and instability;

Second, as discussed in Appellee's brief submitted yesterday, it will render the other litigation on remand from the U.S. Supreme Court moot, and thus make

resolution of the complex constitutional and federal issues in that case unnecessary; and

Third, it will resolve any “contest or controversy,” and thus ensure that Florida’s electors receive conclusive protection under 3 U.S.C. § 5 so that there is no risk of congressional deadlock and Florida’s voters being disenfranchised in the 2000 presidential election.

Moreover, any further review of the Circuit Court’s opinion would ultimately lead to massive uncertainty and discord. The statutory time for certifying county returns passed over three weeks ago, when all 67 Florida counties certified their results. The time provided by this Court for certifying statewide election results passed one and a half weeks ago, on November 26. And now, the time when Florida’s electors would lose conclusive status in Congress is a mere six days away.

Even if Appellants were able to overturn each of the Circuit Court’s many factual findings, and even if Appellants were able to advance an argument now that clears the threshold for triggering a recount (a task not remotely accomplished in the Circuit Court), any attempted remedy now – that involved yet another recount on any significant scale – would likely prove futile. To resolve the legal issues in this appeal and in the federal remand, to gather the ballots in question, to segregate any subsets to be counted, to determine who should conduct a count, to ascertain

what standards govern the count, and to ensure fairness, openness, and regularity – all before December 12 comes and goes – is all but entirely unfeasible. And, even then, no doubt, the litigation would continue, key federal questions would be unresolved and subject to appeal, and the public’s distrust in the ultimate outcome would grow.

Accordingly, Appellees respectfully submit, the best exercise of this Court’s discretion, in Florida’s interest and the nation’s, would be to decline to hear this appeal and to bring an end to the many weeks of election discord and uncertainty for all the voters.

STATEMENT OF THE CASE

On November 27, 2000, Appellants Albert Gore Jr. and Joseph I. Lieberman filed their contest action in Leon County Circuit Court, pursuant to Section 102.168 of the Florida Statutes. Trial was held on December 2 and 3, 2000. On December 4, 2000, the Circuit Court issued its findings of fact and law, and entered a final judgment in favor of Appellees. On the same day, Appellants filed a notice of appeal to the District Court of Appeal, First District, which certified the matter to this Court pursuant to Article V Section 3 (b)(5) of the Florida Constitution. Appellees file this brief, which includes the issue of this Court’s discretion to accept this case.

STATEMENT OF THE FACTS

Appellants' principal claim is that the Canvassing Boards in Miami-Dade and Palm Beach Counties erred by not including "legal" votes in their certified election results, and by failing to complete manual recounts before the deadline set by this Court. The "votes" that Appellants claim were wrongly excluded are marks, indentations, and incomplete punctures of "chads" that allegedly result from defects in the use of punchcard ballot machines. In the trial court, however, Appellants offered no evidence to support their claims.

I. Punchcard Ballot Machines and Manual Recounts

Fifteen counties in Florida used Votomatic punchcard ballot machines in the 2000 Presidential election, including both Palm Beach and Miami-Dade Counties. Tr. 202. Across the country, 31% of the voters in the 2000 Presidential election voted on punchcard ballot machines. Tr. 51. There is no evidence to suggest that the punchcard ballot machines used in Miami-Dade and Palm Beach Counties are materially different, or that they are maintained in a materially different fashion, than machines elsewhere in Florida or across the United States.

The instructions provided to voters are explicit and clear:

Look at the back of the ballot card, then be sure all holes are cleanly punched, and then pull off any partially punched chips, . . . that might be hanging. If your punched votes have made small circular holes, return your ballot to the election official and request a new one.

Tr. 162-63.

A. Punchcard ballot machines do not lead to a systematic “undervote.”

In the court below, Appellants failed to present any evidence that punchcard ballot machines like the Votomatic are responsible for causing “undervotes.” An undervote (as that term is used by the experts in this case) is “any ballot that went through the machine at some point and did not register a vote” for President. Tr. 180-81. The record reflects that voters sometimes choose not to vote in every race during an election – including the Presidential race. *See* Tr. 355-56. Appellants argue that some of these undervotes were not really non-votes, but rather failed votes that were not properly recorded. Their hypothesis is that because of poor design or maintenance of the punchcard voting machines, people who otherwise intended to cast a vote were for some reason unable to punch the chad through to properly record their vote. Appellants therefore claim that *any* mark or impression should be counted as a vote.

Appellants’ statistician, Prof. Hengartner, presented a chart that purported to describe the average undervote in the 2000 Presidential election. Hengartner suggested that the average “undervote” was .3% in those counties using optical scanner voting systems and 1.5% in those counties using punchcard voting systems. Tr. 184-85. He also testified that if one were to assume that all of these

counties are indistinguishable from one another (i.e., there are no demographic, socioeconomic or other differences between the counties), then the likelihood of this difference in the undervote rates would be “very remote.” Tr. 185.

There are many reasons to question the accuracy and reliability of that opinion. First, though his conclusions were based on all 67 of Florida’s counties, Hentgartner testified that he received information regarding the undervote rate from only 50 of the counties. Tr. 181-82. For the other 17 counties – nearly 25% of the overall dataset – he relied exclusively upon information that he found in unidentified “newspaper sources.” *Id.* Second, Hentgartner admitted that both an affidavit containing his opinions (submitted to a different Court) and a proffer virtually indistinguishable from that affidavit (which was submitted to *this* Court) were false and misrepresented the work that he had done. Tr. 228-229.

Even if one accepts the opinions expressed by Hentgartner, they prove nothing. At most, Hentgartner has stated that there may be an *association* between punchcard machines and the undervote rate. But that does not explain *why* there might be a higher undervote in counties that use punchcard devices. Hentgartner admitted that this question – the question of *causation* – is “something else.” Tr. 207. *See also* Tr. 330-334.²

² Hengartner agreed “just because two things are related to one another, doesn’t mean that you know the cause of one or the other,” confirming that his testimony

Hengartner refused to offer any opinion as to why there is a higher incidence of undervote in punchcard counties. He also refused to offer any opinion as to whether the machines were preventing people who were attempting to vote from registering their votes. Asked if he had any opinion on these subjects, Hengartner said: “I have many opinions, but I have no proof.” Tr. 212. He further conceded that there was no “data to support” any opinions that he might have regarding causation.³

The testimony of Appellants’ statistician is not even very strong with respect to *association*. As Dr. Laurentius Marais testified, the undervote percentages advanced by Hengartner are averages, “and the numbers that are being averaged vary quite widely.” Tr. 336. Further, there is no dispute that with respect to the undervote rate, there is a “substantial overlap between the optical and the punch card counties,” with twelve of the 67 counties falling into that overlap range. Tr. 336. Finally, the undervote rate varies among punchcard counties almost as much as it does between punchcard counties and optical-scanner counties. Tr. 336-37. Consequently, it is impossible to conclude even that the undervote rate has a strong

provides no insight into whether faulty voting devices *cause* undervotes. Tr. 209. *See also* Tr. 334 (Marais testimony agreeing that “there is not enough information . . . to draw any such conclusion”).

³Tr. 212; Tr. 211; *see also* Tr. 353, 356 (Marais testimony that there is “absolutely” no evidence to support Appellants’ theory of causation).

association with the type of voting method used. In fact, the record shows that one can conclude only that “there are other factors accounting for differences in the undervote rate among the counties.” Tr. 337.

The record shows that there are many possible reasons for variations in the undervote rates among Florida’s counties. Both statisticians who testified agreed that at least some of the difference is explained by demographic differences among counties. Tr. 198; Tr. 353-56. Hentgartner also testified that any association between the voting method used in a particular county and the undervote rate in that county might exist not because of problems with the machinery, but rather because the voting method influenced whether people actually chose to vote in a particular race. Tr. 211-12. As Marais testified, the relevant scholarly literature supports this hypothesis. Tr. 340-44.

The undisputed evidence in the record is that there are a variety of potential explanations for differences in the undervote rates among the counties. Tr. 337-40. *There is no evidence in the record at all* to support the theory that punchcard voting machines frustrated voters who intended to vote for President.

C. There is no workable standard for discerning “voter intent” from indentations, marks or “dimples” on ballots.

Many of the disputed ballots that Appellants have asked to be manually recounted bear only slight indentations, marks or other impressions. Tr. 250-51. However, Appellants have not offered any workable standard for doing so.

There are a number of different ways in which indentations, marks and “dimples” can be left on ballots. Most do not reflect a voter’s intent to vote. Among other things, indentations and other impressions can result from improper or rough handling of ballots, Tr. 397-99, voters who pick at the ballots and handle them while waiting in line, Tr. 400-01, processing the ballots or removal of hanging chads, Tr. 401-03, or flaws in the paper, Tr. 397-98. In addition, repeated handling and machine processing of punchcard ballots can also cause degradation of the ballots over time. Tr. 400-02.

Appellants’ own expert, Kimball Brace, admitted that indentations could be created on a ballot by accident, by a voter who did *not* intend to vote. “If you were to rub my finger across there, that could create an indentation, and that obviously shouldn’t be counted as intent to the voter.” Tr. 99. Mr. Brace further acknowledged that the “only indentation that even should be considered” as a vote would be one “made by a stylus against the card.” Tr. 99.⁴ Appellants presented

⁴Mr. Brace purported to demonstrate to the Circuit Court how it was possible to create an indentation on a chad. However, Mr. Brace admitted that in this alleged experiment he was trying to make an indentation, *not* trying to *vote*. Tr. 104. He further admitted that he was using a “demonstrator” ballot that is substantially

no evidence whatsoever concerning the percentage of indentations, marks or dimples that were *actually* the result of a stylus contacting the chad.

Nor was there any evidence of the percentage of indentations made *by a stylus* that reflect a voter's intent to vote rather than a decision not to vote. The only Florida voter who testified in this case, William Rohloff, explained that he placed the stylus in the hole corresponding to his presidential candidate, rested the stylus there while he thought about whether to cast his vote, and then decided not to vote. Tr. 455-56. Mr. Rohloff followed the instructions for voting on a punchcard machine. *Id.* He intentionally voted for other candidates by punching the chad completely out. Tr. 457. He intentionally registered *no* vote for President by withdrawing the stylus without punching through the chad. Tr. 456. Mr. Rohloff intended *not* to vote for the candidate whose chad he touched with the stylus. Tr. 456; 458.

Judge Charles Burton testified that he *tried* to make dimpled chads on the voting machine used in Palm Beach County, but found it difficult to do: “[I]t was very difficult to make an indentation like that, because it seemed it was quite easy

different in its manufacture than the actual ballots used in an election. Tr. 104-07. This experiment is unreliable. Far more reliable is the experiment he performed on cross-examination, when he was asked to follow the instructions on the Votomatic machine and cast a vote for President. Tr. 109-10. In that experiment, which he performed on a 20-year old machine on which the rubber strips had never been

for me to pop out the chad.” Tr. 258. In other words, it is difficult to make an indentation that does not dislodge the chad *even when one is trying to do so*, much less when one is trying to vote.

Appellants offered testimony from only one witness, Kimball Brace, on the subject of why indentations and other marks should be considered conclusive evidence of a voter’s intent to vote. Mr. Brace did not address the numerous ways in which marks and indentations might *accidentally* be left on a ballot. Nor did he explain how a finder of fact could ascertain *which* indentations and other marks on a ballot *actually* reflect an intent to vote, instead of an intent *not* to vote.

Mr. Brace is a political scientist and demographer by trade, whose only exposure to punchcard ballot machines and their operation has been through his work as a consultant in the general field of “election administration.” Tr. 49-53; 65. Mr. Brace was not tendered or qualified an expert on the manufacture or function of punchcard ballot machines. Tr. 69-70. He admitted that he had no expertise in “engineering.” Tr. 66. While he purported to opine about the properties of rubber strips used in the punchcard machines, Mr. Brace admitted that he is “not a rubber expert.” Tr. 121. Mr. Brace offered his opinions about the causes of indentations and dimples after inspecting only a few out of the many

changed, Mr. Brace had no difficulty at all removing the chad completely from the ballot. *Id.*

thousands of punchcard ballot machines used in Palm Beach and Miami-Dade counties during the 2000 Presidential election. Tr. 73. Mr. Brace did not inspect *any* of the Votomatic machines actually used in Miami-Dade County. Tr. 67.⁵

Mr. Brace could offer no opinion as to the condition of the machines actually used in the election. Instead, Mr. Brace offered his theories as to what he “imagined” or “supposed” might have caused voters to leave only indentations when they intended to vote.⁶

1. Chad Buildup

Mr. Brace first opined that indentations might be caused by “chad buildup.” Mr. Brace’s opinion on this subject was full of qualifiers. He stated: “[I]t is also *possible* that an indentation is made *if, in fact*, the machines are not cleaned out on a regular basis, *and there’s chad buildup*, and therefore, the voter *may not* be able to push down as firmly.” Tr. 83 (emphasis added).

This opinion as to what is “possible” is not based on any expertise, it is purely speculative, and it has no basis in fact. Appellants offered no evidence that

⁵He inspected two sample machines *not used* in the election. Tr. 74-75. Mr. Brace also chose *not* to inspect the Votomatic machines used in Palm Beach. Tr. 67-68. Instead, he inspected only a small number of Pollstar machines in Palm Beach. Tr. 73. His only observation, having viewed these machines, was that the templates used with the machines were “scratched” on the left-hand side. Tr. 85.

any of the machines “in fact” are not well maintained, or that there was “in fact” chad buildup sufficient to prevent a voter from successfully removing the chad from only the Presidential race. And Mr. Brace himself could offer no opinion on this subject because he is not an expert on the maintenance of the machines, and in any event did not examine even a reasonably large sample of the machines at issue.

Even if there *were* evidence to support Mr. Brace’s theory that there is “chad buildup,” he offered only his *speculation* that chad buildup would cause a voter to leave only an indentation instead of a clean vote. Mr. Brace said only that “it is possible” that a voter “may not” be able to cast a vote because of a build up of chad. Tr. 83. Mr. Brace’s “chad buildup” theory also would not explain why voters would be unable to punch through chads *only* in the Presidential election, and not in other races.

The only competent testimony on the “chad buildup” theory came from John Ahmann. Tr. 416-23. Mr. Ahmann invented the Votomatic machine that is currently in use in Miami-Dade and Palm Beach Counties, and he has been

⁶See, e.g., Tr. 110 (“I imagine that people could hit the funnel.”); Tr. 112 (“imagine[d]” that styluses “could” scratch the template); 117 (“supposition was that rubber on the left-hand side is more frequently used”).

working in the voting machine industry for over 34 years. Tr. 387-92. Mr. Ahmann explained that chad buildup would *not* cause indentations. Tr. 417.⁷

2. Hardening Rubber

Mr. Brace's second theory is that the rubber strips used to capture the chad as it is punched out by the stylus might become hard and brittle through repeated use, thereby preventing a voter from completely punching out the chad. Tr. 83. Mr. Brace hypothesized that the rubber strips on the far left of the device (under the Presidential race) would get more wear than the strips under the rest of the ballot. Tr. 119-20. As with the "chad buildup" theory, Mr. Brace's opinion on this subject was heavily qualified. Tr. 83 ("The third reason is that those rubber strips, *if they're not properly maintained may* become old, brittle, hard and keep a voter . . .") (emphasis added); Tr. 87 ("It is *possible* that hardening of the rubber *could* have a problem.") (emphasis added). By his own admission, Mr. Brace is "not a rubber expert." Tr. 121. He also admitted that he has no expertise in engineering. Tr. 66. He lacks the expertise, therefore, to opine that the rubber used in the left-hand column of these punchcard ballot machines would become hard and brittle.

⁷Appellants made much of a patent application by Mr. Ahmann for a new stylus that would better dislodge chad if in fact chad buildup were to take place. The application specified, however, that the problem that could potentially result from chad building was "hanging chad," not a dimpled chad. The application never mentioned dimples as a possible consequence of chad buildup. Tr. 440.

Mr. Brace also pointed to no evidence that the rubber strips *in fact* were not properly maintained, and admitted that he had “not tested” this theory. Tr. 120. On cross-examination, Mr. Brace acknowledged that he did not know the name of the machine that would be used to conduct such a test. Tr. 120-21. Indeed, he acknowledged that he did not know what kind of material was used in the machines at issue, or whether that material would become harder through repeated use. Tr. 121-24. Like the “chad buildup” theory, Appellants’ “rubber” theory was pure speculation.

The only competent testimony on the “hard rubber” theory came from Richard Grossman, a chemist with over 43 years of experience in the field. Mr. Grossman explained that the composition of rubber like that used in the T-strips of the punchcard voting machines, was designed to avoid problems with hardening. Tr. 296-303. He also testified that rubber would react consistently across the machine. Tr. 298-99. Mr. Ahmann, an expert on punchcard ballot machines, confirmed that he had never encountered a problem with hard rubber in the field, and in a particular that he had never known the rubber used in the T-strips to harden under only the Presidential part of the ballot. Tr. 417.

3. Angling Stylus

Mr. Brace’s third theory was that a voter might try to vote by inserting the stylus into the template of the machine at an angle. Tr. 84. Mr. Brace supposed

that “if you put the stylus in on a slight angle, instead of straight up and down,” a indentation might result. *Id.* Like Mr. Brace’s other theories, this theory has no basis in fact. The voting instructions clearly state that the stylus should be inserted “straight down.” Dfts Ex. 531; Tr. 159-61. Mr. Brace did not offer any basis for his supposition that voters fail to follow that instruction, or that inserting the stylus at an angle would lead to a dimple. Mr. Brace stated only that he “imagined” this could happen. Tr. 110. This opinion from Mr. Brace was, again, pure speculation.

4. Ballot on Top

Mr. Brace’s fourth theory was that a voter might create indentations by placing the ballot *on top* of the template on the machine, instead of inserting the ballot into the throat of the template as instructed. Tr. 78-79. Mr. Brace testified that if a voter were to do this, contrary to the instructions for voting, Tr. 80, he could leave a dimple instead of removing the chad. Tr. 78-79. Mr. Brace offered no testimony as to the *number* of voters that attempt to vote this way, and as the Circuit Court itself found in considering this theory, “if somebody is not going to follow the instructions . . . there’s no telling who they voted for.” Tr. 82.

Many of the “undervote” ballots that were not counted as votes, and which Appellants have challenged, contained indentations *only* in the left-hand column. Tr. 251-52. Mr. Brace admitted that if a voter were to place the ballot on top of the template and to attempt to vote in the fashion he described, one “would see the

indentations or dimples on the other offices, and not just President.” Tr. 115. As Mr. Brace admitted, “you would expect that those indentations continued down the ballot.” Tr. 116.

II. The Manual Recount In Palm Beach County.

Judge Charles Burton explained the manual recount conducted by the Palm Beach County Canvassing Board (“PBCCB”), and the procedures that were followed. On November 15, 2000, Judge Labarga issued an order instructing the PBCCB to apply a totality of the circumstances standard during its full manual recount to determine voter intent. Dftt’s Ex. 39. The PBCCB began its manual recount on November 16. Tr. 248. Prior to beginning the manual recount, the PBCCB reaffirmed in writing the standard that it would apply in judging whether “indentations” should be counted as votes. Tr. 246-47; Dfts Ex. 40.

Throughout the manual recount, the PBCCB allowed a ballot having only one corner punched or a dimple to “be counted as a vote if there is clear evidence of a voter’s intent to cast a vote.” Tr. 247; Dfts Ex. 40. The Board “looked at each ballot in total” to determine whether, based on the totality of the circumstances, they could discern the intent of the voter. Tr. 267-68.

On November 20, the Florida Democratic Party filed a renewed motion before Judge Labarga challenging the standard applied by the PBCCB. Tr. 264-65. At the hearing on that motion, Judge Burton explained the standard that the

PBCCB was applying. Tr. 250. Judge Labarga subsequently issued a written order reaffirming the standard he had previously set forth in his November 15 order. Dftt's Ex. 42. In that order, Judge Labarga did not question the standard applied by the PBCCB. *Id.*

The Florida Supreme Court set November 26 at 5 p.m. as a firm deadline for Canvassing Boards to submit amended certifications including the results of any manual recount. Complaint ¶ 14. Between the start of the manual recount on November 16 and the November 26 deadline, Judge Burton was called into court to testify on the motion to clarify filed by the Florida Democratic Party, Tr. 264-65; 284, the Board took a break for Thanksgiving, Tr. 284, and the Florida Democratic Party asked for a hearing before the board to present the testimony of three witnesses on the standard that the Board should apply in reviewing "dimpled" chads. Tr. 269-70.

The Secretary of State's office was open on November 26, but the PBCCB did not file an amended certification before 5 p.m. on that day. Complaint ¶ 14; Tr. 272. As pointed out by the Circuit Court, the time devoted to court hearings and the taking of testimony may well have prevented the PBCCB from completing its manual recount on time. Tr. 284.

Judge Burton explained that in the final few hours of the manual recount, the PBCCB stopped attempting to segregate out ballots for which objections had been

stated. Tr. 280-81. He also explained that applying a different standard to the approximately 3,300 ballots that were not counted, and for which objections were stated, would result in a different standard being applied to those ballots than had been applied to the remaining 600,000 or so ballots cast in Palm Beach County. Tr. 281. The PBCCB did not submit any official statement of the results of its manual recount on November 26. The PBCCB later submitted amended election results suggesting a net gain for Appellants. Dfts Offer of Proof, Dec. 4, 2000. The PBCCB has subsequently conducted a complete audit of the manual recount results, and reported yet a different result. The *audited* results reflect a net gain of only 176 votes for Appellants. *Id.*

III. The Miami-Dade County Canvassing Board Carefully Considered Ballot Recount Issues and Certified the November 8 Machine Recount

Between the date of the election on November 7, and its decision on November 22 to terminate all manual recount efforts, the Miami-Dade County Canvassing Board met no less than three times to consider its options. On each occasion, the Board took into account the information available to it as well as its past experience in election matters. The Board's decision on November 22 to certify the November 8 machine recount was correct, and certainly was not an abuse of discretion.

On November 14, the Board met and conducted a three-precinct manual recount in the presidential race. Tr. 465-66. The three precincts selected for the manual recount were some of the most heavily Democratic precincts in Miami-Dade County. Tr. 466. Nonetheless, that manual recount revealed only six net additional votes for Appellants even though those precincts voted 10 to 1 for Appellants. Tr. 467. Based on that result, the Board determined that a full manual recount was unnecessary. As Elections Supervisor David Leahy explained:

I have a lot of experience with this system. I've been here since '74 in the election process. I've been with this particular system since '78. I've been involved in numerous re-counts and several hand counts. Based on that experience, it would be my belief that if you counted every ballot by hand in the County, that you would get an equal, proportional share of increased votes for both candidates. I do not believe anything I've seen tonight, warrants us to proceed with an examination of the undercounted votes or calls for a manual recount, so my vote is no.

Tr. 471-72; *see also* Defendant's Exhibit 61 at 352:10-24.

When the Canvassing Board again met on November 17 to consider the Democratic Party's second request for a manual recount, it determined that—while a partial manual recount would be unlawful—it would initiate a full manual recount.⁸ Tr. 473-74. That recount began with a ballot sorting on November 19,

⁸Judge King of the Canvassing Board specifically stated that he believed the statutory provisions governing manual recounts “requires this council to consider a full recount of all ballots in the county if we're going to consider a ballot at all.”

and continued through November 21. Tr. 501-02. On November 22, the Canvassing Board—having counted 15-20% of the precincts in Miami-Dade County—met again to consider its options in light of this Court’s November 21 ruling. By a 3-0 decision, the Board decided to terminate the manual recount. At that point, the only precincts that had been counted were heavily Democratic—in other words the very precincts where Vice President Gore would be expected to pick up the most additional votes. *See* Tr.480-41.

After lengthy deliberations, the Board decided to terminate the manual recount and to certify the election results as they stood on November 8. Pltfs Ex. 31 at 27:6 to 30:11. This decision was based on concerns about the Canvassing Board’s ability to complete the recount and out of concern that ballots in later precincts—which included precincts with significant Cuban and Hispanic populations and precincts which tended to vote Republican—would not be counted. *See* Tr. 471-72; Pltfs Ex. 31 at 27:6 to 27:20. Judge King, a member of the Board, explained:

We cannot meet the deadline of the Supreme Court of the State of Florida, and I feel it incumbent upon this Canvassing Board to count each and every ballot and to not do a hand recount [that] would potentially . . . even under the proposed plan of this morning, could disenfranchise a segment of our community.

Plaintiff’s Exhibit 23 at 104:5-14; *see also* Tr. 476-77. The other Board members concurred. Plaintiff’s Ex. 23 at 104:5-14.

Pltfs Ex. 31 at 27:11 to 27:20. As he had in the past votes, and in deciding to certify the November 8 machine recount, Supervisor Leahy opined on November 22 that a full manual recount had never been “warranted” in Miami-Dade County. Pltfs Ex. 31 at pg. 29. His judgment is especially significant because, in the 15-20% manual recount that the Miami-Dade County Canvassing Board had conducted on November 20 and 21, Supervisor Leahy reviewed numerous ballots including the undervote ballots Appellants asked the Court below to count. Taking all factors into account, both Supervisor Leahy and the Board acted within their discretion in declining to count any additional ballots and by including in the official vote certification none of the undervotes found during the manual recount of November 20 and 21. *See* Pltfs Ex. 31. Pg. 28-29.

IV. Significant Ballot Degradation Occurred in Miami-Dade County Making the Miami-Dade County Undervote Uncertain and Unreliable.

Unavoidably, the various machine and hand recount efforts undertaken by the Miami-Dade County Canvassing Board resulted in significant degradation of those ballots and in an inability to segregate the undervotes. Ballots were run through tabulation machines at least three times.

Thomas Spencer, a Republican Party observer, became involved with the Miami-Dade County Canvassing Board’s recount efforts on November 8. *See* Tr. 462. By that time, the County’s ballots had already been counted once the night

before. Tr. 463. Mr. Spencer then personally observed the machine recount on November 8. *Id.* This recount involved running all of the County's ballots through the vote tabulation machines a second time. Mr. Spencer also testified that all the ballots were run through the machines yet again on November 19, in an attempt to separate undervote ballots from the rest of the ballots. Tr. 478-79. Mr. Spencer described in detail the significant stress this separation effort placed on the ballots. Tr. 484-85. Mr. Spencer also observed that an entire precinct tray of ballots was dropped on the floor of the counting room. Tr. 485. Another Republican observer noted that the machine sorting effort on November 19 resulted in the separation of numerous new chads from the ballots. *See* Tr. 505-06. Approximately one thousand new chads were observed as the result of the machine sorting effort. Tr. 506. Similar handling issues arose during the manual recount itself. Ballots were fanned, rubbed, and twisted during this counting effort by both County employees and by the Canvassing Board. *See* Tr. 507-09. The Republican observer saw that more chads were separated from the ballots due to this handling. Tr. 508-09.

Finally, Republican observer Marc Lampkin, testified that County employees engaged in extensive ballot handling on November 29 in an effort to reconcile conflicting undervote tallies in Miami-Dade County. Tr. 546-548, 552-54. According to Mr. Lampkin, County employees discovered that the undervotes

in certain precincts did not match earlier noted totals. Tr. 547-48. In fact, over 150 of the 614 precincts apparently had undervote totals on November 29 that varied from those earlier reported, with 120 precincts containing fewer undervotes than had been previously thought, and 34 containing more undervotes than had previously been thought. Tr. 549-50; Tr. 466. Multiple precincts were run through tabulation machines yet a fourth time in an effort to resolve these numerous discrepancies, and many ballots were again manually counted. Tr. 553-54. This resulted in still more chads being separated from the ballots. Tr. 554.

These efforts did not, however, resolve the conflicting undervote counts, and Miami-Dade County officials were never able to provide Mr. Lampkin with an explanation of the discrepancies. Tr. 550. From his day of observing County employees attempting to ascertain the number of undervotes present in that County, Mr. Lampkin concluded that the undervote total was “shifting.” Tr. 552.

This testimony is particularly significant because Appellants offered no evidence to establish the integrity of the ballots or to demonstrate that the ballots containing undervotes in Miami-Dade County had either already been reliably identified or that such ballots *could* be reliably identified. Instead, Mr. Lampkin’s testimony demonstrates that the undervote totals for particular Miami-Dade County precincts on November 29 were inconsistent with, earlier undervote totals. Tr. 548-49.

V. The Nassau County Certification

On November 7, 2000, all ballots cast for President in Nassau County were counted. Tr. 568. On November 8, 2000, an automatic machine recount was conducted and the results were certified by the Nassau County Canvassing Board. Tr. 568-70 On November 9, 2000, the Nassau County Supervisor of Elections realized that 218 ballots were not run through the machine in the automatic recount, because they were inadvertently left in the transport cases. Tr. 570-73, 581. On November 24, 2000, after proper notice, the Canvassing Board held a meeting to address the problem. Tr. 579-81. Nassau Stipulation ¶ 7. Because Mr. Dave Howard was unable to attend, Ms. Marianne Marshall was selected as a substitute member of the Board. Tr. 578.⁹ At the meeting, the Canvassing Board voted unanimously to amend its certification to reflect the accurate November 7 count, rather than the erroneous November 8 recount. Tr. 580-81.

SUMMARY OF THE ARGUMENT

On November 7, 2000, the people of Florida and the nation cast their votes for President of the United States. One month later, after lawsuit upon lawsuit and

⁹ Ms. Marshall was not a “candidate” for any elected office, because although she had been a candidate for Supervisor of Elections, she had already won and been sworn into office. Tr. 579. Moreover, Ms. Marshall was not involved in the canvassing of the returns for her own election, as the recount was limited to the presidential election. Tr. 568-70.

recount after recount, the nation's future leader remains in doubt. At no time in our nation's history has a presidential race been decided by an election contest in a court of law. To prevail under Florida law, an election contestant must conclusively demonstrate that county canvassing boards abused their duly conferred discretion, and that either illegal votes were counted or legal votes were not counted in sufficient numbers to overturn the results of the election. This is an imposing burden, and one that Appellants have never met.¹⁰

Their *sole* evidence consisted of testimony from two experts: a political scientist and a statistician; beyond those two experts, Appellants offered the court below nothing to support their case. Although the court would certainly have allowed more time for presentation of Appellants' case, they chose to rest after their two experts opined on hypothetical possibilities. They offered not a single witness from Palm Beach County, Miami-Dade County, or Nassau County. They

¹⁰As the Circuit Court properly determined, a plaintiff cannot contest a certification merely by alleging that ballots cast in an election, tabulated, and recorded as "no votes" somehow are rejected legal votes. Where votes are actually processed through vote tabulation equipment and recorded in the number of ballots cast, the votes themselves (whether undervotes, votes for a candidate, or overvotes) cannot be said to have been rejected. In such a case, all the votes are accepted. To hold otherwise would be to throw open for contest every election where the margin between the candidates is less than the total number of "no votes" (undervotes and overvotes) cast. In this case, that would mean any margin less than the total number of "no votes" recorded would force the Court to manually recount every no vote cast in the state. There is no basis for that construction of section 102.168(3)(c).

presented no testimony whatsoever that those counties did anything to abuse their discretion; indeed, they presented no testimony about *anything* those counties did. Unsurprisingly, the court expressly found their witnesses – the hypothesizing political scientist and the statistician who admitted to filing the false affidavit – not to be credible. The Circuit Court found that Appellants had failed to prove their case. Those factual determinations are plainly correct.

As a matter of law, the Circuit Court made five independent findings, each of which standing alone, is sufficient to support the verdict:

First, the Circuit Court determined that Appellants had failed to establish a legal basis for ordering a recount. This failure is unremarkable: their legal theory throughout has been that no such basis is necessary. But it is not the case that a contestant, merely by asking is entitled to a recount. That would make the contest proceedings under Section 102.168, perversely, more permissive than the protest proceedings under Section 102.166, and would transform the ordinary counter of ballots in close elections from the county canvassing boards to the Circuit Courts in Florida.

Second, the Circuit Court found that “there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different.” This factual finding, based on direct

assessments of the credibility of Appellants' witnesses, should be fully honored on appeal.

Third, the Circuit Court found that none of the county canvassing boards had abused their discretion. This finding – a direct result of Appellants' decision to introduce no evidence at all about the county canvassing boards' conduct – is likewise not clearly erroneous.

Fourth, the Circuit Court held that there was no authority in Florida law for a partial manual recount – Appellants' sole requested remedy – in a statewide election contest. There is no provision of Florida law that permits – let alone requires – the local canvassing boards to certify or the Elections Canvassing Commission to accept such partial returns and no authority to include returns submitted past the deadline established by the Florida Supreme Court in this election.

And *Fifth*, the Circuit Court noted that any post-election change in applicable standards for counting ballots – such as any newfound “dimple” standard, contrary to Palm Beach County's pre-existing standard – could constitute a change in law under 3 U.S.C. § 5 and therefore endanger Florida's electors. And, if ballots in one county were reviewed under a standard different than that applied in other counties, significant disparities could arise among in the impact of

individual votes creating a situation that would violate federal constitutional standards.

At the end of the day, Appellants seek to overturn an appropriate decision of the Miami-Dade County Canvassing Board not to conduct a full manual recount due to time limitations, the sound discretion of the Palm Beach County Canvassing Board not to count “rogue” dimples as clear evidence of voter intent, the correct certification by the Nassau County Canvassing Board of the election night results, and the Secretary of State’s decision not to accept statutorily unauthorized partial recounts not completed by this Court’s stated deadline of 5:00 p.m. November 26, 2000. They seek to do so without demonstrating the substantial factual or legal predicate necessary to overturn a certified election. These heavily fact-laden determinations were made by a trial court that heard all the witnesses, weighed all the evidence, and was in the best position to resolve these factual disputes. This Court should not second-guess its judgment.

STANDARD OF REVIEW

“Evidentiary findings and conclusions of the trier of facts where supported by legally sufficient evidence should not be lightly set aside by those possessing the power of review.” *Florida Bar v. Abramson*, 199 So. 2d 457, 460 (Fla. 1967).

Factual conclusions are “clothed with a presumption of correctness.”¹¹ This court cannot review evidence *de novo*, substituting its own opinion of the facts and credibility of the witnesses for that of the trial court. Rather, this Court “must indulge every fact and inference in support of the trial court’s judgment, which is the equivalent of the jury verdict.” *Smiley*, 704 So. 2d at 205.

The judgment of the trial court “will be upheld if there is any basis which would support the judgment in the record.” *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999) (citing numerous decisions). In this Court, any disputed issues of fact must be reviewed in the light most favorable to the prevailing party, and the findings and rulings of the Circuit Court should be affirmed unless they are unsupported by any basis in the record. *See Woodlands Civic Association, Inc. v. Darrow*, 765 So. 2d 874, 876 n.3 (Fla. 5th Dist. Ct. App. 2000).

ARGUMENT

I. The Circuit Court Correctly Held There Was No Factual Or Legal Basis To Order A Manual Recount.

¹¹*Smiley v. Greyhound Lines, Inc.*, 704 So. 2d 204, 205 (Fla. 5th Dist. Ct. App. 1998). *Accord Lee v. Lee*, 563 So. 2d 754, 755 (Fla. 3rd Dist. Ct. App. 1990) (refusing to reweigh evidence on appeal, stating that trial court’s findings of fact will not be set aside unless “totally unsupported by competent and substantial evidence”).

A. The Circuit Court Correctly Held That Actions Of County Canvassing Boards Are Reviewed Under The Abuse Of Discretion Standard.

Under Florida law, “returns certified by election officials are presumed to be correct.” *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1976). “This is because the canvassing of returns . . . is vested in canvassing boards . . . who make judgments on the validity of ballots.” *Id.* As the Circuit Court correctly held, “[t]he local boards have been given broad discretion, which no court may overrule, absent a clear abuse of discretion.” Circuit Court Decision in *Gore v. Harris*, No. 00-2808, Transcript dated December 3, 2000 at 10 (“Findings”). “Although Section 102.168 grants the right to a contest, it does not change the discretionary aspect of the review procedures outlined in Section 102.166.”¹² Under that standard, “[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. *Ashcraft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1313 (Fla. 1986) (citing *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

To overcome the presumption of the validity of certified election results, Appellants were required to prove, by clear and convincing evidence,

¹²*Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th Dist. Ct. App. 1992). See also *Quinn v. Stone*, 259 So. 2d 492, 494 (Fla. 1972) (applying abuse of discretion standard).

(1) “substantial noncompliance” with a *mandatory* statutory duty by the Canvassing Boards, and (2) that there was a “reasonable probability” that such alleged noncompliance would affect the outcome of the certified election results.¹³

It was not enough for Appellants to identify a specially selected group of ballots and allege that they should have been counted. Under the Florida Constitution, the Court *cannot* intervene to overturn the judgment of the Canvassing Boards *unless* Appellants prove “clear, substantial departures from essential requirements of law.” *Boardman*, 323 So. 2d at 268 n.5. Absent a clear violation of law, the Canvassing Board’s judgments “should be upheld rather than substituted by the impression[s]” of this Court. *Id.*¹⁴

In the Circuit Court, Appellants failed to present *any* evidence that the Canvassing Boards abused their discretion. Instead, Appellants based their entire case on the proposition that the Canvassing Boards’ decisions are irrelevant, arguing instead that the ballots are the “best evidence” and that the Circuit Court should have conducted a de novo review of those ballots. Appellants relied on several Florida cases, including *State v. Smith*, 144 So. 333 (Fla. 1932), which

¹³*Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998); *Hogan*, 607 So. 2d at 510; *Burke v. Beasley*, 75 So. 2d 7, 8 (Fla. 1954). *Accord* Findings at 9.

actually *contradicts* their position, as the Circuit Court properly recognized. Findings at 8. *Smith* holds that the Circuit Court may examine ballots to verify the accuracy of returns *only* if the certified returns have been shown to be unreliable “because of some substantial failure on the part of the election officers to proceed according to the law in making or arriving at their returns and certificates.” *Smith*, 144 So. at 336. Thus, under *Smith*, to obtain the relief they seek, Appellants must first establish that the actions of the Canvassing Boards were contrary to law.¹⁵

Appellants’ argument that they must be granted a recount in a contest action simply because they allege the possibility that legal votes were not counted, is also contrary to the statutory scheme. As this Court has held

Since there is no common law right to contest elections, any statutory grant must necessarily be construed to grant only such rights as are explicitly set out. *See Pearson v. Taylor*, 159 Fla. 775, 32 So. 2d 826

¹⁴*See Beckstrom*, 707 So. 2d at 724 (“It is clear that the controlling authority in Florida is the *Boardman* decision and that, in *Boardman*, the Supreme Court intended to circumscribe the Court’s involvement in the electoral process.”).

¹⁵None of Appellants’ other cases even mention the appropriate standard of review for ordering a manual recount, nor do they involve the discretion of Canvassing Boards. *See Beckstrom*, 707 So. 2d at 725 (recognizing necessity of finding that election officials substantially failed to comply with statutory election procedures to void election); *Hornsby v. Hilliard*, 189 So. 2d 361, 363 (Fla. 1966) (holding that “blank, spoiled, or irregular ballots” cannot be considered, but not addressing what standard the trial court should follow); *State v. Latham*, 170 So. 472, 473-74 (Fla. 1936) (discussing admissibility into evidence of ballots only after plaintiffs establish integrity of ballots); *State v. Peacock*, 170 So. 309, 309 (Fla. 1936) (holding that when voters comply with all requirements, their votes should be counted despite error by election official, but not addressing voter error absent statutory noncompliance by election officials). *See Findings at 10.*

(1947). The statutory election contest has been interpreted as referring only to consideration of the balloting and counting process. *State ex rel. Peacock v. Latham*, 125 Fla. 69, 169 So. 597 (1936); *Farmer v. Carson*, 110 Fla. 245, 148 So. 557 (1933).

McPherson v. Flynn, 399 So. 2d 665, 668 (Fla. 1981).

In *Hogan*, the court held that a judicial manual recount of ballots is appropriate only if the Canvassing Board abused its discretion or engaged in irregularities. In that case, a city council candidate lost by three votes, and after the required machine recount was behind by five votes with 42 undervotes. *Id.* at 509. The Canvassing Board denied the candidate's request for a manual recount because the difference in vote counts was likely due to voter error. *Id.* In the post-certification contest, the trial court granted Appellants' request for a manual recount, but the Fourth District Court of Appeal reversed, stating:

Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. The *statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.*

Id. at 510 (emphasis added). The court concluded:

All that should have been considered by the lower court was whether [the county canvassing board] *failed to perform some mandatory statutory act or whether there were any electoral improprieties* which had, not possibly might have, an influence on the ultimate choice of the voters. [The board] acted within its discretion in this case

Id. (emphasis added).

Thus, even in an extremely close election, where the number of undervotes attributable to voter error easily exceeds the margin of victory, a court may not order a manual recount under Section 102.168 unless the Appellant *first* establishes that the Canvassing Board failed to perform a mandatory statutory act. As the *Hogan* Court observed, “[i]t is understandable that an individual losing an electoral race” by such a close margin “would look upon the results with some consternation,” and that an order for a manual recount might “mollif[y] the disgruntled candidate,” but these “are not the controlling factors in the statutory scheme.” 607 So. 2d at 510.¹⁶

B. The County Canvassing Boards Did Not Abuse Their Discretion.

1. The Miami-Dade Canvassing Board did not abuse its discretion in deciding not to complete a manual recount.

The Circuit Court held that the Miami-Dade County Canvassing Board “did not abuse its discretion in any of its decisions in its review and recounting processes.” Findings at 10. Appellants were not entitled to a manual count of the ballots by the Circuit Court.

At Appellants’ request, the Miami-Dade County Canvassing Board exercised its discretion under Section 102.166 to conduct a sample manual count.

¹⁶*See also In re Contest Election*, 444 N.E.2d 170, 183 (Ill. 1983) (“[A]ppellants must show more than a mere desire to have a recount of the votes and a reexamination of the ballots which they hope will show a different result than officially proclaimed”).

After sampling three highly-Democratic precincts containing approximately 5,000 votes, the Board found a net effect of only six votes for Vice President Gore. Tr. 465-67. The Board found that the minor discrepancy in the results was not attributable to a vote tabulation error, and that even assuming there was such an error, the correction of any error would not have affected the outcome of the election. See Tr. 471-72, D. Ex. 61 at 352. Having failed to make the requisite finding, the Board had no statutory authority to conduct a manual recount. See FLA. STAT. § 102.166.

The Circuit Court properly held that Appellants failed to prove abuse of discretion. Notice of Appellants' expert witnesses contradicted the Board's decision. Their testimony *confirmed* the Board's decision that a county-wide manual recount would *not* change the result of the election. Statement of Facts, *supra*. Appellees' evidence confirmed this fact. Tr. 324, 326-28.

The Board did not abuse its discretion by suspending its manual count in light of the November 26 deadline established by this Court in *Harris*. The decision was properly based on the Board's conclusion that it was not physically possible to complete the recount by the mandatory deadline imposed by the Court. P. Ex. 31 at 27-29. A governmental body need not engage in a futile act. See *International Fidelity Ins. Co. v. Prestige Rent-A-Car, Inc.*, 715 So. 2d 1025, 1028 (Fla. 5th Dist. Ct. App. 1998).

2. Miami-Dade Canvassing Board's decision not to certify its partial manual recount was not an abuse of discretion.

Appellants argue that the results of a partial recount conducted by the Miami-Dade Canvassing Board should have been included in the final certification. However, as the Canvassing Board recognized, certification of a partial recount would contravene Florida law. The Circuit Court agreed, finding “there is no authority under Florida law for certification of an incomplete manual recount of a portion of, or less than all ballots from any county by the state elections canvassing commissioner.” Findings at 9. The Board’s decision was clearly correct as a matter of law, and was an appropriate exercise of its discretion.

Once the Board decides to conduct a manual recount, it is required to recount *all*, not just *some* of the ballots. *See* FLA. STAT. ANN. § 102.166(4)(d); § 102.166(5)(c) (“county canvassing board *shall*,” among other options, “[m]anually recount *all* ballots.”) (emphasis added). The Board thus had no authority to recount or certify only a portion of the ballots.¹⁷

¹⁷In addition, the Miami-Dade’s partial recount disproportionately included votes for Appellants, due to the way the recount was conducted. Appellants received approximately 52% of the vote in Miami-Dade, while Appellees received just over 46%. *See* Tr. at 327. When the Board made its decision to stop the manual recount, it had counted only 137 of 614 precincts in the county. Notwithstanding the closeness of the race countywide, the 137 precincts that the Board had chosen to count first voted overwhelmingly for Appellants, by more than 3 to 1. However, other precincts in Miami-Dade, which the Board had chosen not to count, voted heavily for Appellees.¹⁷ It is obviously not “appropriate” or fair to accept the

Finally, the relief Appellants seek would raise serious issues under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because only five of the approximately 199 predominantly Hispanic communities in Miami-Dade County were included in the partial manual recount. As counsel for Appellees argued before the Canvassing Board, certification of partial results would have had the effect of diluting the votes of Hispanic voters in Miami-Dade County. *See* P. Ex. 30 at 16, 27-28; P. Ex. 31 at 26-27. The Miami-Dade Canvassing Board did not abuse its discretion in rejecting ballots that evidenced no votes.

3. The Palm Beach County Canvassing Board did not abuse its discretion in rejecting ballots that evidenced no votes.

Appellants argue that the Circuit Court should have conducted a *de novo* review of approximately 3,300 ballots, which the Palm Beach County Canvassing Board has already reviewed and determined did not reflect a voter's clear intent to vote. Appellants, however, presented no evidence to indicate that the Canvassing Board had abused its discretion. Instead, as the Circuit Court correctly held, based on the uncontradicted testimony of Judge Charles Burton, Chairman of the Canvassing Board, that the Canvassing Board "did not abuse its discretion in its

results of a partial recount that *included* precincts that Appellant carried by large margins, but *excluded* precincts that Appellee carried by equally large margins. *See* FLA. STAT. ANN. § 102.168(8).

review and recounting process,” and therefore there is no basis to overturn the decisions of the Board. Findings at 11.

Under Florida law, a ballot can only be counted if the intention of the voter is *clear* from the face of the ballot. The Florida Election Code expressly provides that a ballot will be considered valid “if there is a *clear indication* of the intent of the voter.” FLA. STAT. § 101.5612(5) (2000). Conversely, if the voter’s intent cannot be ascertained with “reasonable certainty” from the face of the ballot, no valid vote has been cast. *See* FLA. STAT. § 101.5614 (5), (6) (2000).

On November 15, 2000, after the Canvassing Board began its recount, Judge LaBarga of the Palm Beach County Circuit Court, at the request of the Democratic Party, entered a Declaratory Order, which held that “the present policy of a per se exclusion of any ballot that does not have a partially punched or hanging chad, is not in compliance with the law,” and that the “Canvassing Board has the discretion to consider those ballots and accept them or reject them.”¹⁸ *Florida Democratic Party v. Palm Beach County Canvassing Board*, No. CL00-11078 AB slip op. at 1

¹⁸The Palm Beach Board’s 1990 Guideline provides that “a chad that is fully attached, bearing only an indentation, *should not be counted as a vote*. An indentation may result from a voter placing the stylus in the position, but not punching through. Thus, an indentation is not evidence of intent to cast a valid vote.” Palm Beach County Canvassing Board, Guidelines on Ballots with Chads not Completely Removed, Nov. 2, 1990 (emphasis added). That standard had been in place, unchanged, for ten years.

(Fla. 15th Jud. Cir. Nov. 15, 2000) (emphasis added). Subsequently on November 22, after Judge Burton testified at length on what the standards the Board was applying, Judge LaBarga declined to overrule the Board's decisions and reaffirmed his prior November 15 Order.¹⁹ As the court below recognized, the Palm Beach County Canvassing Board "acted in full compliance with the order of" Judge LaBarga. Findings at 11.²⁰ Appellants presented *no* evidence at trial that the Board abused its discretion in making its factual determinations as to voter intent.²¹

¹⁹ *Florida Democratic Party v. Palm Beach County Canvassing Board*, No. CL00-11078 AB, Order on Plaintiff's Emergency Motion (Fla. Cir. Ct. Nov. 15, 2000).

²⁰ Having complied with the order of the Circuit Court, Palm Beach County is protected from further challenge by Appellants to its recounting standards under principles of collateral estoppel, which prevent parties in privity from re-litigating in a second cause of action the same points and questions that were settled in an earlier cause of action. *See Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995). Although Appellants were not named parties in the earlier suit, they satisfy the privity requirements of Florida law because they succeeded the Florida Democratic Party in interest following the entry of judgment in the suit. Once the Circuit Court's order was entered, the Appellants, not the Florida Democratic Party, stood to gain office by virtue of additional votes gained through the application of those standards. *See Zeidwig v. Ward*, 548 So. 2d 209, 213 (Fla. 1989) Also, this Court has long recognized an exception to the mutuality requirement when the doctrine is used defensively and the facts of the case are compelling. *See Stogniew*, 656 So. 2d at 919 (recognizing an exception to mutuality in prior caselaw "in a defensive context and then only under the compelling facts of th[e] case"). Both such requirements are met here.

²¹ Although Appellees reserve their objection to the standards applied by the Board, based on 3 U.S.C. § 5, Appellees agree that the Board complied with the November 15 Order and therefore did not abuse its discretion.

Appellants complain that the Board did not count *all* the dimpled ballots as votes. However, as the uncontradicted testimony of Judge Burton repeatedly demonstrated, a mere indentation on a punchcard ballot, without something more, does not provide any clue, much less “a clear indication” of voter intent. Tr. at 258; *see also* FLA. STAT. § 101.5614(5). Rather, it is as consistent with a decision *not* to vote as it is with an intention to vote.²²

No Florida court has ever held that dimpled ballots must be counted as votes during a manual recount. In its initial *Harris* opinion, relying in part on Appellants’ representations, this Court quoted *Pullen v. Mulligan* for the proposition that, where the intention of the voter can be ascertained with reasonable certainty from the ballot, that intention should be given effect. *Harris*, Nos. SC00-2348, *et al.*, slip op. at 34. However, contrary to Appellants’ assertion, the *Pullen* case does not stand for the proposition that all dimpled ballots should be counted as votes. The Supreme Court of Illinois found that the procedures adopted by the trial court were proper and that 19 out of 27 votes in question were *disregarded* entirely because the intent of the voter could not reasonably be

²²“Equivocal” evidence is legally insufficient to justify inclusion of such ballots as valid votes. *See, e.g., Escalante v. Hermosa Beach*, 195 Cal. App. 3d 1009 (1987) (“equivocal ballot” is “not countable”); *Fair v. Hernandez*, 116 Cal. App. 3d 868 (1981) (“Ballots are not to be counted as to offices as to which they are equivocal.”); *Adams v. McMullen*, 184 Minn. 602 (1931) (“uncertain and equivocal” ballot “should be rejected”).

ascertained. These 19 votes had dimples or other marks. The 8 votes that were counted were *perforated, not dimpled* ballots, or ballots that contained dimples consistently throughout the ballot. The transcript of the trial court on remand in *Pullen* reads strikingly like the transcripts of the deliberations by the Palm Beach Canvassing Board regarding the approximately 15,000 ballots. *See Pullen v. Mulligan*, No. 90-00-00115, Transcript of Hearing on Sept. 17, 1990, at 136-153 (Ill. Cir. Ct. Ch. Div., Sept. 18, 1990) (relevant pages attached as Ex. 1). *Pullen* does not stand for the proposition that “rogue dimples” or other dimples can be counted, unless the voter cast dimple ballots consistently throughout the punchcard and no other chads were successfully punched.

Because the approximately 15,000 separate factual determinations of the Palm Beach County Canvassing Board comply with the law established by the Florida courts in this election, there could be no abuse of discretion. As this Court held in *Boardman*, the Circuit Court had no authority to substitute its own judgment as to whether, as a matter of fact, individual ballots indicated the intent of the voters. 323 So. 2d at 268 n.5.

4. Palm Beach County’s partial recount results could not be included in the final certification.

The Circuit Court correctly held that there is “no authority under Florida law for certification of an incomplete manual recount.” Findings at 9. The Circuit Court also correctly held that there is no authority to include any returns submitted

by the Palm Beach Board “past the deadline established by the Florida Supreme Court in this election.” *Id.* at 9-10.

There is no authority for the Elections Canvassing Commission to accept the late returns submitted by the Palm Beach County Canvassing Board after the 5:00 p.m. deadline on November 26 imposed by this Court in *Harris*. In *Harris*, this Court commanded that

amended certifications *must* be filed with the Elections Canvassing Commission by 5:00 p.m. on Sunday, November 26, 2000 and the Secretary of State shall accept any such amended certifications received by 5:00 p.m. on Sunday, November 26, 2000.

Harris, Nos. SC00-2346, slip op. at 40 (emphasis added). Because the results of Palm Beach County’s manual count were not submitted within that deadline, the Election Canvassing Commission properly excluded those results.

5. There Is No Factual Or Legal Basis To Reject The Official Certification Of The Nassau County Canvassing Board.

Appellants argue that the final amended certification submitted by the Nassau County Canvassing Board should be rejected in favor of an admittedly erroneous machine recount. As with the Miami-Dade and Palm Beach, the Nassau Board did not abuse its discretion in certifying the original count.

Based on the evidence at trial, the Circuit Court determined that the Nassau Board’s certification of results of the November 8 automatic recount improperly rejected legal votes and that the accurate count of election returns was the original

certification filed November 7. The Circuit Court’s determination was based on the trial testimony of Shirley King and the other evidence presented at trial.

Appellants argued below that the Nassau Board has no discretion under Section 102.141(4), but is required to certify machine recounts, even when it *knows* the recount results to be erroneous. However, the statute does not require certification of an incomplete or irregular return. *See* FLA. STAT. § 102.111(1). The language of Section 102.141(4) contemplates that automatic recounts must include *all* of the ballots. The November 8 certification, which rejected the legal votes of 218 Nassau County citizens, was facially inaccurate and therefore was irregular and false. Because it was undisputedly erroneous, the November 8 machine recount could not be properly certified under Section 102.141(4) and the Board acted within its discretion.²³

Appellants argue that Florida’s “sunshine” law requires that governmental bodies give notice of their meetings and conduct those meetings in public. *See* FLA. STAT. ANN. § 286.011. In this case, the evidence at trial established that the Board’s November 24 meeting was lawfully conducted. The public notice of the

²³Appellants’ citation of *Morse v. Dade County Canvassing Board*, 456 So. 2d 1314 (3rd DCA Fla. 1984), was properly rejected. Appellants argued that *Morse* requires that Canvassing Boards use only the recount tallies when a recount has been conducted under Section 102.141(4). But that proposition *presumes* that the recount was properly conducted.

meeting was given by several means: it was posted at the courthouse and public buildings and was published in the newspaper. Tr. 579. Finally, the substitution of new member Marianne Marshall was not improper, and in any event, could not have been anything more than harmless error. Ms. Marshall's involvement was merely to vote, and her vote was unnecessary, because the three-member Board's vote was unanimous.²⁴

C. Appellants Did Not Prove That the Election Results Would Be Different.

The Circuit Court correctly found that Appellants must demonstrate “reasonable probability” that the results of the election statewide would have been different. A showing of a mere “reasonable possibility” is not sufficient. Tr. at p. 9, lines 7-11. As the Florida courts have held:

It is established that in order to contest election results under [section 102.168], the challenger must show that, but for certain irregularities, the result of the election would have been different and he or she would have been the winner. It is not enough to show a reasonable possibility that election results could have been altered by the irregularities; *a reasonable probability that the results would have been changed must be shown.*

²⁴See *Vans Agnew v. Davidson*, 156 So. 7, 9 (Fla. 1934) (finding in an election case that “[a] certificate signed by a majority of the inspectors is a valid return. The omission of one to perform his duty is not even an irregularity in the return”) (quoting *Brisbee v. Board of State Canvassers*, 17 Fla. 29 (1879)).

Smith v. Tynes, 412 So. 2d 925, 926-27 (Fla. 1st Dist. Ct. App. 1982) (emphasis added) (citing *McQuagge v. Conrad*, 65 So. 2d 851 (Fla. 1953), and others).²⁵

Appellants argument that they are entitled to a court recount simply by alleging the statutory ground in Section 102.168(3), without any proof, ignores that case law and the evidence in the Record.

The Circuit Court made a factual finding that there was “no credible statistical evidence and no other competent substantial evidence to establish by a preponderance a reasonable probability that the results of the statewide election in the state of Florida would be different....” Findings at 9. The evidence in the Record, discussed in the Statement of Facts above, clearly supports the Circuit Court’s finding.

D. A Statewide Contest Would Require Statewide Recount.

In a contest of a statewide election, a statewide recount is required by the Equal Protection Clause of the U.S. Constitution and Florida Statute Section 102.168. As the Circuit Court correctly found:

²⁵Although the Florida Legislature amended Section 102.168 after *Smith*, the legislative history makes clear that the Legislature did not intend a “comprehensive reform,” *see* Comm. on Judiciary, H.R. 99-339, Analysis on H.B. 281 at V., (Fla. Mar. 22, 1999), but merely codified existing contest case law, *see* Comm. on Election Reform, H.R. 99-339, Final Analysis on H.B. 281 at III.A. (Fla. Jul. 15, 1999) (citing cases). The “reasonable probability” standard was part of the existing case law, and continued in effect after the amendment. *See Davies v. Bossert*, 449 So. 2d 418, 420 (Fla. 3d Dist. Ct. App. 1984) (citing cases).

[U]nder Section 102.168 of the Florida Statutes to contest a statewide federal election, the Plaintiff would necessarily have to place at issue and seek as a remedy with the attendant burden of proof, a review and recount on all ballots, and all of the counties in this state with respect to the particular alleged irregularities or inaccuracies in the balloting or counting processes alleged to have occurred.

Findings at 12-13. To prove that the outcome of the election would be different, Appellants must establish that they received a majority or plurality of *all* votes cast in the state.²⁶ Appellants cannot meet that burden by selecting to count only three predominantly Democratic counties that are “likely to yield results favorable to them.” *In re Contest*, 444 N.E.2d at 183. The same factors are present in this case, to a much greater degree, and this Court’s conclusion should be the same.

In *In re Contest*, the Supreme Court of Illinois addressed the issue of whether to allow a contest when a statewide recount would be required. There, the court struck a petition for an election contest in a statewide election for Governor emphasizing the magnitude of a statewide election contest and noting that the court

²⁶See, e.g., *Farmer v. Carson*, 148 So. 557, 560 (Fla. 1933); *Hornsby v. Hilliard*, 189 So. 2d 361 (Fla. 1966); *accord Hennessy v. Porch*, 247 Ill. 388 (1910) (object of contest is to ascertain who received majority of votes, and when court undertakes to count ballots it “will count them all”); *Louden v. Thompson*, 275 N.E.2d 476 (Ill. App. 1971) (purpose of contest is “to ascertain how many votes were cast for or against a candidate, or for or against a measure”); cf. *State ex rel. Clark v. Klingensmith*, 121 Fla. 297 (1935) (In quo warranto proceeding, “the burden is on the relator not only to demonstrate by his allegations and proof that respondent was not elected, but that relator himself was the candidate lawfully chosen by the voters for the office in dispute.”).

would need to count nearly every ballot cast. *Id.* at 183. Important in this determination was that the Appellants had selected only precincts favorable to them for review: “[A]n election contest, however, is not a one-way street.” *Id.* If the contest were permitted to go forward, “it is conceivable that every ballot cast in the election held ... would have to be examined.” *Id.* The court was unwilling to impose such delay and cause political turmoil and uncertainty. *See id.* at 179. This price was too high to pay; and in light of the cost and damage a statewide recount would impose -- and Appellants’ reliance on projections of what they expected a recount to reveal -- the court dismissed the contest. *Id.* at 182-83.

II. THERE ARE FEDERAL CONSTITUTIONAL AND STATUTORY CONSIDERATIONS THAT APPLY TO THIS CASE AND THAT REQUIRE AFFIRMATION OF THE CIRCUIT COURT’S DECISION.

The Circuit Court found as a factual matter that the standard of vote counting in Palm Beach County that existed on November 7, 2000 was that embodied in a written 1990 guideline: that indentations or dimples will not count as votes. The court further noted that any change in that standard may, in turn, be contrary to 3 U.S.C. § 5. Indeed, for a court in a contest proceeding to now apply a standard that counts dimples as votes in selective counties would be directly contrary to 3 U.S.C. § 5, and it would also violate Article II, Section I of the U.S. Constitution. In addition, a change in the deadline for certification for election returns, along with a change in the time period for contesting an election, would

likewise violate Article II, Section 1 of the U.S. Constitution and 3 U.S.C. § 5. Finally, the application of counting standards in different counties as well as the occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution. As Florida's Attorney General recently opined, "[a]s the State's chief legal officer, I feel a duty to warn that [if] the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions." Findings at 12.

CONCLUSION

For the foregoing reasons, Appellees request that the Judgment of the Circuit Court be affirmed.

Respectfully submitted,

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I hereby certify that the font in this brief is Times New Roman 14 point and is in compliance with Florida Rules of Appellate Procedure.

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December 8, 2000

Florida Supreme Court Ruling Ordering Recounts.

Supreme Court of Florida

No. SC00-2431

ALBERT GORE, JR., and JOSEPH I. LIEBERMAN,
Appellants,

vs.

KATHERINE HARRIS, as Secretary, etc., et al.,
Appellees.

[December 8, 2000]

PER CURIAM.

We have for review a final judgment of a Leon County trial court certified by the First District Court of Appeal as being of great public importance and requiring immediate resolution by this Court. We have jurisdiction. See art. V, 3(b)(5), Fla. Const.¹ The final judgment under review denies all relief requested by appellants Albert Gore, Jr. and Joseph I. Lieberman, the Democratic candidates for President and Vice President of the United States, in their complaint contesting

¹The parties have agreed that this appeal is properly before this Court.

the certification of the state results in the November 7, 2000, presidential election.²

Although we find that the appellants are entitled to reversal in part of the trial court's order and are entitled to a manual count of the Miami-Dade County undervote, we agree with the appellees that the ultimate relief would require a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation. Accordingly, we reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

On November 26, 2000, the Florida Election Canvassing Commission (Canvassing Commission) certified the results of the election and declared Governor George W. Bush and Richard Cheney, the Republican candidates for President and Vice President, the winner of Florida's electoral votes.³ The November 26, 2000, certified results showed a 537-vote margin in favor of Bush.⁴

On November 27, pursuant to the legislatively enacted "contest" provisions, Gore filed a complaint in Leon County Circuit Court contesting the certification

²The appellants have alternatively styled their request for relief as a Petition for Writ of Mandamus or Other Writs.

³See §§ 102.111 & .121, Florida Statutes (2000).

⁴Bush received 2,912,790 votes while Gore received 2,912,253 votes.

on the grounds that the results certified by the Canvassing Commission included ~a number of illegal votesTM and failed to include ~a number of legal votes sufficient to change or place in doubt the result of the election.TM

Pursuant to the legislative scheme providing for an "immediate hearing" in a contest action, the trial court held a two-day evidentiary hearing on December 2 and 3, 2000, and on December 4, 2000, made an oral statement in open court denying all relief and entered a final judgment adopting the oral statement. The trial court did not make any findings as to the factual allegations made in the complaint and did not reference any of the testimony adduced in the two-day evidentiary hearing, other than to summarily state that the plaintiffs failed to meet their burden of proof. Gore appealed to the First District Court of Appeal, which certified the judgment to this Court.

The appellants' election contest is based on five instances where the official results certified involved either the rejection of a number of legal votes or the receipt of a number of illegal votes. These five instances, as summarized by the appellants' brief, are as follows:

- (1) The rejection of 215 net votes for Gore identified in a manual count by the Palm Beach

⁵See 102.168(3)(c), Fla. Stat. (2000).

Canvassing Board as reflecting the clear intent of the voters;

(2) The rejection of 168 net votes for Gore, identified in the partial recount by the Miami-Dade County Canvassing Board.

(3) The receipt and certification after Thanksgiving of the election night returns from Nassau County, instead of the statutorily mandated machine recount tabulation, in violation of section 102.14, Florida Statutes, resulting in an additional 51 net votes for Bush.

(4) The rejection of an additional 3300 votes in Palm Beach County, most of which Democrat observers identified as votes for Gore but which were not included in the Canvassing Board's-certified results; and

(5) The refusal to review approximately 9000 Miami-Dade ballots, which the counting machine registered as non-votes and which have never been manually reviewed.

For the reasons stated in this opinion, we find that the trial court erred as a matter of law in not including (1) the 215 net votes for Gore identified by the Palm Beach County Canvassing Board⁶ and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board. However, we find no error in the trial court's findings, which are mixed questions of law and fact, concerning (3) the Nassau County Canvassing Board and the (4) additional 3300 votes in Palm Beach County that the Canvassing Board did not

⁶Bush claims in his brief that the audited total is 176 votes. We make no determination as to which of these two numbers are accurate but direct the trial court to make this determination on remand.

find to be legal votes. Lastly, we find the trial court erred as a matter of law in (5) refusing to examine the approximately 9000 additional Miami-Dade ballots placed in evidence, which have never been examined manually.

II. APPLICABLE LAW

Article II, section I, clause 2 of the United States Constitution, grants the authority to select presidential electors "in such Manner as the Legislature thereof may direct." The Legislature of this State has placed the decision for election of President of the United States, as well as every other elected office, in the citizens of this State through a statutory scheme. These statutes established by the Legislature govern our decision today. We consider these statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5 (1994) entitled "Determination of controversy as to appointment of electors."TM That section provides:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as

provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.
(Emphasis supplied).

This case today is controlled by the language set forth by the Legislature in section 102.168, Florida Statutes (2000). Indeed, an important part of the statutory election scheme is the State's provision for a contest process, section 102.168, which laws were enacted by the Legislature prior to the 2000 election.⁷

⁷In a substantial and dramatic change of position after oral argument in this case, Bush contends in his "Motion for Leave To File Clarification of Argument" that section 102.168 cannot apply in the context of a presidential election. However, this position is in stark contrast to his position both in this case and in the prior appeal. In fact, in Oral Argument on December 7, 2000, counsel for Bush agreed that the contest provisions contained in the Florida Election Code have placed such proceedings within the arena for judicial determination, which includes the established procedures for appellate review of circuit court determinations. Further, Bush's counsel, Michael Carvin, in the prior Oral Argument in Palm Beach Canvassing Board v. Harris, in arguing against allowing manual recounts to continue in the protest phase, stated that he did not

think there would be any problem in producing...that kind of evidence in an election contest procedure...instead of having every court in Florida resolving on an ad hoc basis the kinds of ballots that are valid and not valid, you would be centralizing the factual inquiry in one court in Leon County. So you would bring some orderliness to the process, and they would be able to resolve that evidentiary question. One way or another, a court's going to have resolve it.

(emphasis supplied). Moreover, the Answer Brief of Bush in Case Nos. SC00-2346, 2348, and 2849 (Nov. 18, 2000) a page 18 states that "to implement Petitioners' desired policy of manual recounts at all costs, the Court is asked to . . . (5) substitute the certification process of Section 102.111 and Section 102.112 for the contested election process of Section 102.168 as the means for determining the accuracy of the vote tallies." (emphasis supplied). In addition, the December 5, 2000 brief of Amici curiae of the Florida House of Representatives and the Florida Senate, in case nos. SC00-2346, SC00-2348 & SC00-2349 (Dec. 5, 2000) at 8 "The Secretary's opinion was also consistent with the fact that the statutory protests that can lead to manual recounts are county-specific complaints about a particular county's machines, whereas a complaint about punchcards generally undercounting votes really raises a statewide issue that should be pursued,

Although courts are, and should be, reluctant to interject themselves in essentially political controversies, the Legislature has directed in section 102.168 that an election contest shall be resolved in a judicial forum. See 102.168 (providing that election contests not pertaining to either house of the Legislature may be contested in the circuit courtTM). This Court has recognized that the purpose of the election contest statute is "to afford a simple and speedy means of contesting election to stated offices." Farmer v. Carson, 110 Fla. 245, 251, 148 So. 557, 559 (1933).

In carefully construing the contest statute, no single statutory provision will be construed in such a way as to render meaningless or absurd any other statutory provision. See Amente v. Newman, 653 So. 2d 1030, 1032 (Fla. 1995). In interpreting the various statutory components of the State's election process, then,

if at all, only in a statewide contest." (emphasis supplied). Finally the Amended Answer Brief of the Secretary of State asserted that

[p]etitioner has confused a pre-certification election protest (section 102.166) with a post-certification contest (section 102.168). such facts and circumstances are usually discovered and raised in a contest action that cannot begin until after the election is certified. The Legislature imposed a deadline for certification because of the short time frame within which to begin and conclude an election contest. Petitioners are, in effect, asking this Court to delay the commencement of election contest actions, if any, by improperly using the protest procedures to contest the election before certification. Because the facts and circumstances concerning voter error and ballot design in Palm Beach County are more properly raised in a contest action, these facts were not relevant to the Secretary's decision to certify the election. Her decision triggered the time for bringing any election contest actions. (emphasis supplied).

a common-sense approach is required, so that the purpose of the statute is to give effect to the legislative directions ensuring that the right to vote will not be frustrated. Cf. Firestone v. News-Press Pub. Co., 538 So. 2d 457, 460 (Fla. 1989) (approving common-sense implementation of valid portion of section 101.121, Florida Statutes (1985)-- which broadly read, in pertinent part, that "no person who is not in line to vote may come [into] any polling place from the opening to the closing of the polls, except the officially designated watchers, the inspectors, the clerks of election, and the supervisor of elections or his deputy"-- so as not to exclude persons accompanying aged or infirm voters, children of voting parents, doctors entering the building to treat voters needing emergency care, or persons bringing food or beverages to the election workers because such activities are recognized as "incidental to the voting process and . . . sometimes necessary to facilitate someone else's ability to vote").

Section 102.168(2) sets forth the procedures that must be followed in a contest proceeding, providing that the contestant file a complaint in the circuit court within ten days after certification of the election returns or five days after certification following a protest pursuant to section 102.166(1), Florida Statutes (2000), whichever occurs later. Section 102.168(3) outlines the grounds for contesting an election, and includes: "Receipt of a number of illegal votes or

rejection of a number of legal votes sufficient to change or place in doubt the result of the election." — 102.168(3)(c) (emphasis added). Finally, section 102.168(8) authorizes the circuit court judge to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances." (Emphasis added.)

The Legislature substantially revised section 102.168 in 1999.⁸ That amendment preserved existing rights of unsuccessful candidates and made important additional changes to strengthen the protections provided to unsuccessful candidates in a contest action to be determined.⁹ Moreover, rather

⁸Viewed historically, section 102.168 did not always provide for contests of the type we consider today. As originally enacted, section 102.168 simply provided a mechanism for ouster of elected local officials. Under that version of the statute, election challenges were limited to county offices, and only the person claiming to have been rightfully elected to the position could challenge the election. See Ch. 38, Art. 10, — 7, 8, 9 (1845).

⁹The following language of section 102.168, Florida Statutes was changed in 1999 (words stricken are deletions; words underlined are additions):

(1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1),

whichever occurs later, adjourns, and

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding

than restraining the actions of the trial court hearing the contest, the legislative amendment codified the grounds for contesting an election, entitled any candidate or elector to an immediate hearing and provided the circuit judge with express authority to fashion such orders as are necessary to ensure that each allegation in the complaint is investigated, examined or checked. See Fla. H. R. Comm. on Election Reform, HB 291 (1999) Staff Analysis (February 3, 1999).

Although the right to contest an election is created by statute, it has been a long-standing right since 1845 when the first election contest statute was enacted. See ch. 38, art. 10, — 7-9 Laws of Fla. (1845). As well-established in this State by our contest statute, "[t]he right to a correct count of the ballots in an election is a substantial right which it is the privilege of every candidate for office to insist on, in every case where there has been a failure to make a proper count, call, tally, or return of the votes as required by law, and this fact has been duly established as the basis for granting such relief." State ex rel. Millinor v. Smith, 107 Fla. 134, 139, 144 So. 333, 335 (1932) (emphasis added). The Staff Analysis of the 1999

primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Ch. 99-339, — 3, Laws of Fla.

legislative amendment expressly endorses this important principle. Similarly, the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts expressly declared:

Recounts are an integral part of the election process. For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted. The moment an individual's vote becomes subject to error in the vote tabulation process, the easier it is for that vote to be diluted.

Furthermore, with voting statistics tracing a decline in voter turnout and in increase in public skepticism, every effort should be made to ensure the integrity of the electoral process.

Integrity is particularly crucial at the tabulation stage because many elections occur in extremely competitive jurisdictions, where very close election results are always possible. In addition, voters and the media expect rapid and accurate tabulation of election returns, regardless of whether the election is close or one sided. Nonetheless, when large numbers of votes are to be counted, it can be expected that some error will occur in tabulation or in canvassing.

Id. at 15 (footnotes omitted). It is with the recognition of these legislative realities and abiding principles that we address whether the trial court made errors of law in rendering its decision.

III. ORDER ON REVIEW

Vice President Gore claims that the trial court erred in the following three ways: (1) The trial court held that an election contest proceeding was essentially an appellate proceeding where the County Canvassing Board's decision must be reviewed with an "abuse of discretion," rather than "de novo," standard of review; (2) The court held that in a contest proceeding in a statewide election a court must review all the ballots cast throughout the state, not just the contested ballots; (3) The court failed to apply the legal standard for relief expressly set forth in section 102.168(3)(c).

A. The Trial Court's Standard of Review

_____The Florida Election Code sets forth a two-pronged system for challenging vote returns and election procedures. The "protest" and "contest" provisions are distinct proceedings. A protest proceeding is filed with the County Canvassing Board and addresses the validity of the vote returns. The relief that may be granted includes a manual recount. The Canvassing Board is a neutral ministerial body. See Morse v. Dade County Canvassing Board, 456 So. 2d 1314 (Fla. 3d DCA 1984). A contest proceeding, on the other hand, is filed in circuit court and addresses the validity of the election itself. Relief that may be granted is varied and can be extensive. No appellate relationship exists between a "protest" and a "contest"; a protest is not a prerequisite for a contest. Cf. Flack v. Carter, 392 So.

2d 37 (Fla. 1st DCA 1980) (holding that an election protest under section 102.166 was not a condition precedent to an election contest under section 102.168).

Moreover, the trial court in the contest action does not sit as an appellate court over the decisions of the Canvassing Board. Accordingly, while the Board's actions concerning the elections process may constitute evidence in a contest proceeding, the Board's decisions are not to be accorded the highly deferential ~abuse of discretionTM standard of review during a contest proceeding.

In the present case, the trial court erroneously applied an appellate abuse of discretion standard to the Boards—decisions. The trial court's oral order reads in relevant part:

The local boards have been given broad discretion which no Court may overrule, absent a clear abuse of discretion.

Gore v. Harris, No. 00-2808 (Fla. 2d Cir. Ct. Dec. 4, 2000) (Proceedings at 10).

The trial court further noted: ~The court further finds that the Dade Canvassing Board did not abuse its discretion. . . . The Palm Beach County Board did not abuse its discretion in its review and recounting process.TM In applying the abuse of discretion standard of review to the Boards—actions, the trial court relinquished an improper degree of its own authority to the Boards. This was error.

¹⁰Gore v. Harris, No. 00-2808 (Fla. 2d Cir. Ct. Dec. ___, 2000) (Proceedings at 10-11).

B. Must all the Ballots be Counted Statewide?

Appellees contend that even if a count of the undervotes in Miami-Dade were appropriate, section 102.168, Florida Statutes (2000), requires a count of all votes in Miami-Dade County and the entire state as opposed to a selected number of votes challenged. However, the plain language of section 102.168 refutes Appellees' argument.

Section 102.168(2) sets forth the procedures that must be followed in a contest proceeding, providing that the contestant file a complaint in the circuit court within ten days after certification of the election returns or five days after certification following a protest pursuant to section 102.166(1), whichever occurs later. Section 102.168(3) outlines the grounds for contesting an election, and includes: "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." —

102.168(3)(c) (emphasis added). Finally, section 102.168(8) authorizes the circuit court judge to "fashion such orders as he . . . deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances."

As explained above, section 102.168(3)(c) explicitly contemplates contests based upon a "rejection of a number of legal votes sufficient to change the outcome of an election." Logic dictates that to bring a challenge based upon the rejection of a specific number of legal votes under section 102.168(3)(c), the contestant must establish the "number of legal votes" which the county canvassing board failed to count. This number, therefore, under the plain language of the statute, is limited to the votes identified and challenged under section 102.168(3)(c), rather than the entire county. Moreover, counting uncontested votes in a contest would be irrelevant to a determination of whether certain uncounted votes constitute legal votes that have been rejected. On the other hand, a consideration of ~legal votesTM contained in the category of ~undervotesTM identified statewide may be properly considered as evidence in the contest proceedings and, more importantly, in fashioning any relief.

We do agree, however, that it is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes in this State, not only in Miami-Dade County, but in all Florida counties where there was an undervote, and, hence a concern that not every citizen-s-vote was counted. This election should be determined by a careful examination of the votes of Florida-s-citizens and not by strategies extraneous to the voting process. This essential

principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court in resolving elections disputes.

We are dealing with the essence of the structure of our democratic society; with the interrelationship, within that framework, between the United States Constitution and the statutory scheme established pursuant to that authority by the Florida Legislature. Pursuant to the authority extended by the United States Constitution, in section 103.011, Florida Statutes (2000), the Legislature has expressly vested in the citizens of the State of Florida the right to select the electors for President and Vice President of the United States:

Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

Id. In so doing, the Legislature has placed the election of presidential electors squarely in the hands of Florida's voters under the general election laws of

Florida.¹¹ Hence, the Legislature has expressly recognized the will of the people of Florida as the guiding principle for the selection of all elected officials in the State of Florida, whether they be county commissioners or presidential electors.

When an election contest is filed under section 102.168, Florida Statutes (2000), the contest statute charges trial courts to:

fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Id. (emphasis added). Through this statute, the Legislature has granted trial courts broad authority to resolve election disputes and fashion appropriate relief. In turn, this Court, consistent with legislative policy, has pointed to the ~will of the voters™ as the primary guiding principle to be utilized by trial courts in resolving election contests:

[T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct

¹¹In other words, the Legislature has prescribed a single election scheme for local, state and federal elections. The Legislature has not, beyond granting to Florida's voters the right to select presidential electors, indicated in any way that it intended that a different (and unstated) set of election rules should apply to the selection of presidential electors. Of course, because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict.

interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). For example, the Legislature has mandated that no vote shall be ignored ~if there is a clear indication of the intent of the voter™on the ballot, unless it is ~impossible to determine the elector–s-choice™– 101.5614(5)-(6) Fla. Stat. (2000). Section 102.166(7), Florida Statutes (2000), also provides that the focus of any manual examination of a ballot shall be to determine the voter–s-intent. The clear message from this legislative policy is that every citizen–s-vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States.¹²

¹²In the election contest at issue here, this Court can do no more than see that every citizen–s vote be counted. But it can do no less. In a scenario somewhat analogous to that presented here, and in an election contest for a seat in the United States House of Representatives, the contesting candidate sought to exclude some 11,000 votes from being counted because the votes were not timely reported to the Secretary of State. See State ex rel. Chappell v. Martinez, 536 So. 2d 1007. This Court, in a unanimous opinion authored by Justice McDonald, refused to exclude the votes and held that the contesting candidate ~has presented no compelling reason for disenfranchising the 11,000 residents of Flagler County who cast their ballots on November 8.™Id. at 1009.

The demonstrated problem of not counting legal votes inures to any county utilizing a counting system which results in undervotes and ~no registered vote™ ballots. In a countywide election, one would not simply examine such categories of ballots from a single precinct to insure the reliability and integrity of the countywide vote. Similarly, in this statewide election, review should not be limited to less than all counties whose tabulation has resulted in such categories of ballots. Relief would not be ~appropriate under [the] circumstances™ if it failed to address the ~otherwise valid exercise of the right of a citizen to vote™ of all those citizens of this State who, being similarly situated, have had their legal votes rejected. This is particularly important in a Presidential election, which implicates both State and uniquely important national interests. The contestant here satisfied the threshold requirement by demonstrating that, upon consideration of the thousands of undervote or ~no registered vote™ ballots presented, the number of legal votes therein were sufficient to at least place in doubt the result of the election. However, a final decision as to the result of the statewide election should only be determined upon consideration of the legal votes contained within the undervote or ~no registered vote™ ballots of all Florida counties, as well as the legal votes already tabulated.

C. The Plaintiff-s-Burden of Proof

It is immediately apparent, in reviewing the trial court's ruling here, that the trial court failed to apply the statutory standard and instead applied an improper standard in determining the contestant's burden under the contest statute. The trial court began its analysis by stating:

[I]t is well established and reflected in the opinion of Judge Joanos and *Smith v. Tine*^[13] [sic], that in order to contest election results under Section 102.168 of the Florida Statutes, the Plaintiff must show that, but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner.

It is not enough to show a reasonable possibility that election results could have been altered by such irregularities, or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.

In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission.

This analysis overlooks and fails to recognize the specific and material changes to the statute which the Legislature made in 1999 that control these proceedings. While the earlier version, like the current version, provided that a

¹³*Smith v. Tynes*, 412 So. 2d 925 (Fla. 1st DCA 1982) (involving allegations of enumerated acts asserted to constitute fraud and misrepresentation to the electorate sufficient to produce a different result) (citing *Nelson v. Robinson*, 301 So. 2d 508 (Fla. 2d DCA 1974), cert. denied 303 So. 2d 21 (Fla. 1974) (involving a post-election challenge to a form of ballot which listed the candidates for a single office in alphabetical order using the same color ink, but on different lines)).

contestant shall file a complaint setting forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election,TMthe prior version did not specifically enumerate the grounds for contesting an election under this section.TMThose grounds, as contained in the 1999 statute, now explicitly include, in subsection (c), the receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.TM(Emphasis supplied.) Assuming that reasonableness is an implied component of such a doubt standard,¹⁴ the determination of whether the plaintiff has met his or her burden of proof to establish that the result of an election is in doubt is a far different standard than the reasonable probabilityTMstandard, which was applicable to contests under the old version of the statute, and erroneously applied and articulated as a preponderance of a reasonable probabilityTM standard by the trial court here. Where, as here, a person authorized to contest an election is required to demonstrate that there have been legal votes cast in the election that have not been counted (here characterized as undervotesTM or no vote registeredTM ballots) and that available data¹⁵ shows

¹⁴Cf. Standard Jury Instructions in Criminal Cases, 697 So. 2d 84, 90 (Fla. 1997) (approving standard jury instruction regarding reasonable doubt,TMwhich is not a mere possible doubt, a speculative, imaginary or forced doubt,TM and which may arise from the evidence, conflict in the evidence or the lack of evidenceTM).

¹⁵In this case, the circuit court did not review the ballot presented as evidence.

that, applying an analysis of the historical recovery rate of legal votes within those undervotes or ~no vote registeredTM ballots, by extrapolation, a number of legal votes would be recovered from the entire pool of the subject ballots which, if cast for the unsuccessful candidate, would change or place in doubt the result of the election. Here, there has been an undisputed showing of the existence of some 9,000 ~under votesTM in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest showing that the result of an election has been placed in doubt, warranting a manual count of all undervotes or ~no vote registeredTM ballots, has been made.

LEGAL VOTES

Having first identified the proper standard of review, we turn now to the allegations of the complaint filed in this election contest. To test the sufficiency of those allegations and the proof, it is essential to understand what, under Florida law, may constitute a ~legal vote,TM and what constitutes rejection of such vote.

Section 101.5614(5), Florida Statutes (2000), provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.TM Section 101.5614(6) provides, conversely, that any vote in which the board cannot discern the intent of the voter must be discarded. Lastly, section 102.166(7)(b) provides that, "[i]f a counting team is

unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.TM This legislative emphasis on discerning the voter's intent is mirrored in the case law of this State, and in that of other states.

This Court has repeatedly held, in accordance with the statutory law of this State, that so long as the voter's intent may be discerned from the ballot, the vote constitutes a "legal vote" that should be counted. See McAlpin v. State ex rel. Avriett, 155 Fla. 33, 19 So. 2d 420 (1944); see also State ex rel. Peacock v. Latham, 25 Fla. 69, 70, 169 So. 597, 598 (1936) (holding that the election contest statute "affords an efficient available remedy and legal procedure by which the circuit court can investigate and determine, not only the legality of the votes cast, but can correct any inaccuracies in the count of the ballots by having them brought into the court and examining the contents of the ballot boxes if properly preservedTM). As the State has moved toward electronic voting, nothing in this evolution has diminished the longstanding case law and statutory law that the intent of the voter is of paramount concern and should always be given effect if the intent can be determined. Cf. Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975), cert. denied, 425 U.S. 967 (1976) (recognizing the overarching principle that, where voters do all that statutes require them to do, they should not be

disfranchised solely because of failure of election officials to follow directory statutes).

Not surprisingly, other states also have recognized this principle. Cf. Delahunt v. Johnston, 671 N.E. 2d 1241 (Mass. 1996) (holding that a vote should be counted as a legal vote if it properly indicates the voter's intent with reasonable certainty); Duffy v. Mortensen, 497 N.W.2d 437 (S.D. 1993) (applying the rule that every marking found where a vote should be should be treated as an intended vote in the absence of clear evidence to the clear contrary); Pullen v. Mulligan, 561 N.E.2d 585 (Ill. 1990) (holding that votes could be recounted by manual means to the extent that the voter's intent could be determined with reasonable certainty, despite the existence of a statute which provided that punch card ballots were to be recounted by automated tabulation equipment).

Accordingly, we conclude that a legal vote is one in which there is a "clear indication of the intent of the voter." We next address whether the term "rejection" used in section 102.168(3)(c) includes instances where the County Canvassing Board has not counted legal votes. Looking at the statutory scheme as a whole, it appears that the term "rejected" does encompass votes that may exist but have not been counted. As explained above, in 1999, the Legislature substantially revised the contest provision of the Election Code. See H.R. Comm.

on Election Reform, HB 281 (February 3, 1999). One of the revisions to the contest provision included the codification of the grounds for contesting an election. See id. at 7. The House Bill noted that one of the grounds for contesting an election at common law was the "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." As noted above, the contest statute ultimately contained this ground for contesting the results of an election.

To further determine the meaning of the term "rejection", as used by the Legislature, we may also look to Florida case law. In State ex rel. Clark v. Klingensmith, 121 Fla. 297, 163 So. 704 (1935), an individual who lost an election brought an action for quo warranto challenging his opponent's right to hold office. The challenger challenged twenty-two ballots, which he divided into four groups. One of these groups included three ballots that the challenger claimed had not been counted. See 121 Fla. at 298, 163 So. at 705. This Court concluded that "the rejection of votes from legal voters, not brought about by fraud, and not of such magnitude as to demonstrate that a free expression of the popular will has been suppressed," is insufficient to void an election, "at least unless it be shown that the votes rejected would have changed the result." 121 Fla. at 300, 163 So. at 705. Therefore, the Court appears to have equated a

"rejection" of legal votes with the failure to count legal votes, while at the same time recognizing that a sufficient number of such votes must have been rejected to merit relief. This notion of "rejected" is also in accordance with the common understanding of rejection of votes as used in other election cases. In discussing the facts in Roudebush v. Hartke, 405 U.S. 15 (1972), the United States Supreme Court explained:

If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened. The recount commission may make new and independent determinations as to which ballots shall be counted. In other words, it may reject ballots initially counted and count ballots initially rejected. Id.

This also comports with cases from other jurisdictions that suggest that a legal vote will be deemed to have been "rejected" where a voting machine fails to count a ballot, which has been executed in substantial compliance with applicable voting requirements and reflects, the clear intent of the voter to express a definite choice. See In re Matter of the Petition of Katy Gray-Sadler, 753 A.2d 1101, 1105-06 (N.J. 2000); Moffat v. Blaiman, 361 A.2d 74, 77 (N.J. Super. Ct. App. Div. 1976).

Here, then, it is apparent that there have been sufficient allegations made which, if analyzed pursuant to the proper standard, compel the conclusion that

legal votes sufficient to place in doubt the election results have been rejected in this case.

THIS CASE

We must review the instances in which appellants claim that they established that legal votes were rejected or illegal voters were included in the certifications.

The refusal to review approximately 9,000 additional Miami-Dade Ballots, which the counting machine registered as non-votes and which have never been manually reviewed.

On November 9, 2000, the Miami-Dade County Democratic Party made a timely request under section 102.166 for a manual recount.¹⁶ After first deciding against a full manual recount, the Miami-Dade County Canvassing Board voted to begin a manual recount of all ballots cast in Miami-Dade County for the Presidential election, and the manual recount began on November 19, 2000. On November 21, 2000, this Court issued its decision in Palm Beach Canvassing Board v. Harris, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000), stating that amended certifications must be filed by 5 p.m. on Sunday, November 26, 2000.

¹⁶On November 9, 2000, a manual recount was requested on behalf of Vice-President Gore in four counties æ Miami-Dade, Broward, Palm Beach and Volusia. Broward County and Volusia County timely completed a manual recount. It is undisputed that the results of the manual recounts in Volusia County and Broward County were included in the statewide certifications.

The Miami-Dade Canvassing Board thereafter suspended the manual recount and voted to use the election returns previously compiled. Earlier that day, the panel had decided to limit its recount to the 10,750 "undervotes," that is, ballots on which no vote was registered by counting machines. The Board's stated reason for the suspension of the manual recount was that it would be impossible to complete the recount before the deadline set forth by this Court. At the time that the Board suspended the recount, approximately 9,000 of the 10,750 undervotes had not yet been reviewed. In the two days that the Board had counted ballots, the Board identified 436 additional legal votes (from 20 percent of the precincts, representing 15 percent of the votes cast) which the machines failed to register, resulting in a net vote of 168 votes for Gore. Nonetheless, in addition to suspending further recounting, the Board also determined that it would not include the additional 436 votes that had been tabulated in its partially completed recount.

Specifically as to Miami-Dade County, the trial court found:

[A]lthough the record shows voter error, and/or, less than total accuracy, in regard to the punchcard voting devices utilized in Miami-Dade and Palm Beach Counties, which these counties have been aware of for many years, these balloting and counting problems cannot support or effect any recounting necessity with respect to Miami-Dade County, absent the establishment of a reasonable probability that the statewide election

result would be different, which has not been established in this case.

The Court further finds that the Dade Canvassing Board did not abuse its discretion in any of its decisions in its review in recounting processes.

This statement is incorrect as a matter of law. In fact, as the Third District determined in Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board, 25 Fla. L. Weekly D2723 (Fla. 3d DCA Nov. 22, 2000), the results of the sample manual recount and the actual commencement of the full manual recount triggered the Canvassing Board's "mandatory obligation to recount all of the ballots in the county." In addition, the circuit court was bound at the time it ruled to follow this appellate decision. This Court has determined the decisions of the district courts of appeal represent the law of this State unless and until they are overruled by this Court, and therefore, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts. See Pardo v. State, 596 So.2d 665, 666 (Fla. 1992).

However, regardless of this error, we again note the focus of the trial court's inquiry in an election contest authorized by the Legislature pursuant to the express statutory provisions of section 102.168 is not by appellate review to determine whether the Board properly or improperly failed to complete the manual recount. Rather, as expressly set out in section 102.168, the court's responsibility is to

determine whether "legal votes" were rejected sufficient to change or place in doubt the results of the election. Without ever examining or investigating the ballots that the machine failed to register as a vote, the trial court in this case concluded that there was no probability of a different result. First, as we stated the trial court erred as a matter of law in utilizing the wrong standard. Second, and more importantly, by failing to examine the specifically identified group of uncounted ballots that is claimed to contain the rejected legal votes, the trial court has refused to address the issue presented. Appellants have also been denied the very evidence that they have relied on to establish their ultimate entitlement to relief.¹⁷ The trial court has presented the plaintiffs with the ultimate Catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine such evidence. We also note that whether or not the Board could have completed the manual recount by November 26, 2000, or whether the Board should have fulfilled its responsibility and completed the full manual recount it commenced,

¹⁷The Miami-Dade Canvassing Board stated as its reasons that it stopped an ongoing manual recount because it determined that it could not meet this Court's certification deadline. However, nothing in this Court's prior opinion nor the statutory scheme governing manual recounts would have prevented the Board from continuing after certification the manual recount that it had properly started. The Canvassing Board is a neutral ministerial body. See Morse v. Dade County Canvassing Board, 456 So. 2d 1314 (Fla. 3d DCA 1984). Therefore, although the Board may have acted in a neutral fashion, the fact remains that three other Boards (Broward, Palm Beach and Volusia) completed the recounts.

the fact remains that the manual recount was not completed through no fault of the Appellant.¹⁸

3300 Votes in Palm Beach County

Appellants also contend that the trial court erred in finding that they failed to satisfy their burden of proof with respect to the 3,300 votes that the Palm Beach County Canvassing Board reviewed and concluded did not constitute "legal votes" pursuant to section 102.168(3)(c). However, unlike the approximately 9,000 ballots in Miami-Dade that the County Canvassing Board did not manually recount, the Palm Beach County Canvassing Board did complete a manual recount of these 3,300 votes and concluded that, because the intent of the voter in these 3,300 ballots was not discernable, these ballots did not constitute "legal votes."

After a two-day trial in this case, the circuit court concluded:

[W]ith respect to the approximately 3,300 Palm Beach County ballots of which plaintiffs seek review, the Palm Beach Board properly exercised its discretion in its counting process and has judged those ballots which plaintiffs wish this court to again judge de novo. . . . The Palm Beach County board did not abuse its discretion in

¹⁸On Thanksgiving Day, November 23, 2000, an Emergency Petition for Writ for Mandamus was filed in which Gore sought to compel the Miami-Dade Canvassing Board to continue with the manual recount. Although we denied relief on that same day, in our order denying this relief, the Court specifically stated that the denial was "without prejudice to any party raising any issue presented in the writ in any future proceeding." Accordingly, at the time that we denied mandamus relief we clearly contemplated that this claim could be raised in a contest action.

its review and recounting process. Further, it acted in full compliance with the order of the circuit court in and for Palm Beach County.

We find no error in the trial court's determination that appellants did not establish a preliminary basis for relief as to the 3300 Palm Beach County votes because the appellants have failed to make a threshold showing that "legal votes" were rejected. Although the protest and contest proceedings are separate statutory provisions, when a manual count of ballots has been conducted by the Canvassing Board pursuant to section 102.166, the circuit court in a contest proceeding does not have the obligation de novo to simply repeat an otherwise-proper manual count of the ballots. As stated above, although the trial court does not review a Canvassing Board's actions under an abuse of discretion standard, the Canvassing Board's actions may constitute evidence that a ballot does or does not qualify as a legal vote. Because the appellants have failed to introduce any evidence to refute the Canvassing Board's determination that the 3300 ballots did not constitute "legal votes," we affirm the trial court's holding as to this issue. This reflects the proper interaction of section 102.166 governing protests and manual recounts and section 102.168 governing election contests.

Whether the vote totals must be revised to include the legal votes actually identified in the Palm Beach County and Miami-Dade County manual recounts?

Appellants claim that the certified vote totals must be amended to include legal votes identified as being for one of the presidential candidates by the County Canvassing Boards of Palm Beach County and Miami-Dade during their manual recounts. After working for a period of many days, the Palm Beach County Canvassing Board conducted and completed a full manual recount in which the Board identified a net gain of 215 votes for Gore.¹⁹ As discussed above, the Miami-Dade Canvassing Board commenced a manual recount but did not complete the recount. During the partial recount it identified an additional legal votes, of which 302 were for Gore and 134 were for Bush, resulting in a net gain of 168 votes for Gore.

The circuit court concluded as to Palm Beach County that there was not any "authority to include any returns submitted past the deadline established by the Florida Supreme Court in this election." This conclusion was erroneous as a matter of law. The deadline of November 26, 2000, at 5 p.m. was established in order to allow maximum time for contests pursuant to section 102.168. The deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the Election Canvassing Commission's certification of the results of a

¹⁹Bush asserted that the audited total is 176 votes.

recount of less than all of a county's ballots. In the same decision we held that all returns must be considered unless their filing would effectively prevent an election contest from being conducted or endanger the counting of Florida's electors in the presidential election.

As to Miami-Dade County, in light of our holding that the circuit court should have counted the undervote, we agree with appellants that the partial recount results should also be included in the total legal votes for this election. Because the county canvassing boards identified legal votes and these votes could change the outcome of the election, we hold that the trial court erred in rejecting the legal votes identified in the Miami-Dade County and Palm Beach County manual recounts. These votes must be included in the certified vote totals. We find that appellants did not establish that the Nassau County Canvassing Board acted improperly.

CONCLUSION

Through no fault of appellants, a lawfully commenced manual recount in Dade County was never completed and recounts that were completed were not counted. Without examining or investigating the ballots that were not counted by the machines, the trial court concluded there was no reasonable probability of a different result. However, the proper standard required by section 102.168 was

whether the results of the election were placed in doubt. On this record there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt. We know this not only by evidence of statistical analysis but also by the actual experience of recounts conducted. The votes for each candidate that have been counted are separated by no more than approximately 500 votes and may be separated by as little as approximately 100 votes. Thousands of uncounted votes could obviously make a difference.

Although in all elections the Legislature and the courts have recognized that the voter's intent is paramount, in close elections the necessity for counting all legal votes becomes critical. However, the need for accuracy must be weighed against the need for finality. The need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law. Notwithstanding, consistent with the legislative mandate and our precedent, although the time constraints are limited, we must do everything required by law to ensure that legal votes that have not been counted are included in the final election results.²⁰ As recognized by the Florida House of

²⁰This Presidential election has demonstrated the vulnerability of what we believe to be a bedrock principle of democracy: that every vote counts. While there are areas in this State which implement systems (such as the optical scanner) where the margins of error, and the ability to

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Contests and Recounts:

[A]ll election contests and recounts can be traced to either an actual failure in the election system or a perception that the system has failed. Public confidence in the election process is essential to our democracy. If the voter cannot be assured of an accurate vote count, or an election unspoiled by fraud, they will not have faith in other parts of the political process. Nonetheless, it is inevitable that legitimate doubts of the validity and accuracy of election outcomes will arise. It is crucial, therefore, to have clearly defined legal mechanisms for contesting or recounting election results.

Id. at 21 (emphasis supplied) (footnote omitted).

Only by examining the contested ballots, which are evidence in the election contest, can a meaningful and final determination in this election contest be made. As stated above, one of the provisions of the contest statute, section 102.168(8), provides that the circuit court judge may ~fashion such orders as he . . . deems necessary to ensure that each allegation in the complaint is investigated, examined or checked, to prevent any alleged wrong, and to provide any relief appropriate under such circumstances. (emphasis supplied).

demonstrably verify those margins of error, are consistent with accountability in our democratic process, in these election contests based upon allegations that functioning punch-card voting machines have failed to record legal votes, the demonstrated margins of error may be so great to suggest that it is necessary to reevaluate utilization of the mechanisms employed as a viable system.

In addition to the relief requested by appellants to count the Miami-Dade undervote, claims have been made by the various appellees and intervenors that because this is a statewide election, statewide remedies would be called for. As we discussed in this opinion, we agree. While we recognize that time is desperately short, we cannot in good faith ignore both the appellant's right to relief as to their claims concerning the uncounted votes in Miami-Dade County nor can we ignore the correctness of the assertions that any analysis and ultimate remedy should be made on a statewide basis.²¹

We note that contest statutes vest broad discretion in the circuit court to "provide any relief appropriate under the circumstances." Section 102.168(5). Moreover, because venue of an election contest that covers more than one county lies in Leon County, see 102.1685, Florida Statutes (2000), the circuit court has jurisdiction, as part of the relief it order, to order the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties

²¹The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law. We can only do the best we can to carry out our sworn responsibilities to the justice system and its role in this process. We, and our dissenting colleagues, have simply done the best we can, and remain confident that others charged with similar heavy responsibilities will also do the best they can to fulfill their duties as they see them.

that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith, said tabulation to take place in the individual counties where the ballots are located.²²

Accordingly, for the reasons stated in this opinion, we reverse the final judgment of the trial court dated December 4, 2000, and remand this cause for the circuit court to immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed, and for other relief that may thereafter appear appropriate. The circuit court is directed to enter such orders as are necessary to add any legal votes to the total statewide certifications and to enter any orders necessary to ensure the inclusion of the additional legal votes for Gore in Palm Beach County²³ and the 168 additional legal votes from Miami-Dade County.

Because time is of the essence, the circuit court shall commence the tabulation of the Miami-Dade ballots immediately. The circuit court is authorized,

²²We are mindful of the fact that due to the time constraints, the count of the undervotes places demands on the public servants throughout the State to work over this week-end. However, we are confident that with the cooperation of the officials in all the counties, the remaining undervotes in these counties can be accomplished within the required time frame. We note that public officials in many counties have worked diligently over the past thirty days in dealing with exigencies that have occurred because of this unique historical circumstance arising from the presidential election of 2000. We commend those dedicated public servants for attempting to make this election process truly reflect the vote of all Floridians.

²³See discussion at n.6, supra.

in accordance with the provisions of section 102.168(8), to be assisted by the Leon County Supervisor of Elections or its sworn designees. Moreover, since time is also of the essence in any statewide relief that the circuit court must consider, any further statewide relief should also be ordered forthwith and simultaneously with the manual tabulation of the Miami-Dade undervotes.

In tabulating the ballots and in making a determination of what is a "legal" vote, the standards to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a "legal" vote if there is "clear indication of the intent of the voter." Section 101.5614(5), Florida Statutes (2000).

It is so ordered.

ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

WELLS, C.J., dissents with an opinion.

HARDING, J., dissents with an opinion, in which SHAW, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

WELLS, C.J., dissenting.

I join Justice Harding's dissenting opinion except as to his conclusions with regard to error by Judge Sauls and his conclusions as to the separateness of section 102.166 and 102.168, Florida Statutes (2000). I write separately to state my additional conclusions and concerns.

I want to make it clear at the outset of my separate opinion that I do not question the good faith or honorable intentions of my colleagues in the majority. However, I could not more strongly disagree with their decision to reverse the trial court and prolong this judicial process. I also believe that the majority's decision cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution.

My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates.

Importantly to me, I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there

is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution.

On the basis of my analysis of Florida law as it existed on November 7, 2000, I conclude that the trial court's decision can and should be affirmed. Under our law, of course, a decision of a trial court reaching a correct result will be affirmed if it is supportable under any theory, even if an appellate court disagrees with the trial court's reasoning. Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 644-645 (Fla. 1999). I conclude that there are more than enough theories to support this trial court's decision.

There are two fundamental and historical principles of Florida law that this Court has recognized which are relevant here. First, at common law, there was no right to contest an election; thus, any right to contest an election must be construed to grant only those rights that are explicitly set forth by the Legislature. See McPherson v. Flynn, 397 So. 2d 665, 668 (Fla. 1981). In Flynn, we held that, "[a]t common law, except for limited application of quo warranto, there was no right to contest in court any public election, because such a contest is political in nature and therefore outside the judicial power."TMId. at 667.

Second, this Court gives deference to decisions made by executive officials charged with implementing Florida—s election laws. See Krivanek v. Take Back Tampa Political Committee, 625 So. 2d 840 (Fla. 1993). In Krivanek, we said:

We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. Boardman v. Esteve, 323 So.2d 259 (Fla.1975), cert. denied, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed.2d 791 (1976). As noted in Boardman:

The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties.... [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Id. at 844-45. These two concepts are the foundation of my analysis of the present case.

At the outset, I note that, after an evidentiary hearing, the trial court expressly found no dishonesty, gross negligence, improper influence, coercion, or

fraud in the balloting and counting processes based upon the evidence presented. I conclude this finding should curtail this Court's involvement in this election through this case and is a substantial basis for affirming the trial court. Historically, this Court has only been involved in elections when there have been substantial allegations of fraud and then only upon a high threshold because of the chill that a hovering judicial involvement can put on elections. This to me is the import of this Court's decision in Boardman v. Esteva, 323 So.2d 259 (Fla.1975). We lowered that threshold somewhat in Beckstrom v. Volusia County Canvassing Board, 707 So. 2d 720 (Fla. 1998), but we continued to require a substantial noncompliance with election laws. That must be the very lowest threshold for a court's involvement.

Otherwise, we run a great risk that every election will result in judicial testing. Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters not by judges. We must have the self-discipline not to become embroiled in political contests whenever a judicial majority subjectively concludes to do so because the majority perceives it is ~the right thing to do.TM Elections involve the other branches of government. A lack of self-discipline in being involved in elections, especially by a court of last resort, always has the potential of leading to a crisis

with the other branches of government and raises serious separation-of-powers concerns.

I find that the trial judge correctly concluded that plaintiffs were not entitled to a manual recount. Petitioners filed this current election contest after protests in Palm Beach and Miami-Dade Counties. Section 102.168, Florida Statutes, in its present form is a new statute adopted by the Legislature in 1999. I conclude that the present statutory scheme contemplates that protests of returns²⁴ and requests for manual recounts²⁵ are first to be presented to the county canvassing boards. See 102.166, Fla. Stat. This naturally follows from the fact that, even with the adoption of the 1999 amendments to section 102.168, the only procedures for manual recounts are in the protest statute. Once a protest has been filed, a county canvassing board then has the discretion, in accordance with the procedures set forth in section 102.166(4), Florida Statutes, whether to order a sample limited manual recount. See 102.166(4)(c), Fla. Stat. (2000). Once the sample recount is complete and the county canvassing board concludes that there was an error in the vote tabulation that could affect the outcome of the election, section

²⁴See 102.166(1), Fla. Stat. (2000).

²⁵See 102.166(4)(b), Fla. Stat. (2000).

102.166(5) instructs what must then be done. One option is to manually recount all ballots. See 102.166(5)(c), Fla. Stat. (2000).²⁶

I believe that the contest and protest statutes must logically be read together. The contest statute has significant references to the protest statute. If there is a protest, a party authorized by the statute to file a contest must file a complaint ~within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1).TM 102.168(2), Fla. Stat. (2000). In the election contest, the canvassing board is the proper party defendant under section 102.168(4). Further, under section 102.168(8), the circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that the allegations upon which the complaint is brought are investigated, examined, or checked.

²⁶Also problematic with the majority's analysis is that the majority only requires that the ~under-votesTM are to be counted. How about the ~over-votes?TM Section 101.5614(6) provides that a ballot should not be counted ~[i]f an elector marks more names than there are persons to be elected to an office,TM meaning the voter voted for more than one person for president. The underlying premise of the majority's rationale is that in such a close race a manual review of ballots rejected by the machines is necessary to ensure that all legal votes cast are counted. The majority, however, ignores the over-votes. Could it be said, without reviewing the over-votes, that the machine did not err in not counting them?

It seems patently erroneous to me to assume that the vote-counting machines can err when reading under-votes but not err when reading over-votes. Can the majority say, without having the over-votes looked at, that there are no legal votes among the over-votes?

I find correct the analysis undertaken in Broward County Canvassing Board v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992), a case recently cited by this Court in Palm Beach County Canvassing Board v. Harris, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000). In Hogan, the Fourth District Court of Appeal reversed the trial court's order granting a manual recount, in contravention of the county canvassing board's decision noting that:

Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.

Id. at 510. I do not believe there is any sound reason to conclude that the Legislature's adoption of revised section 102.168 in 1999 intended to change this and provide for a duplicative recount by an individual circuit judge.

I also agree with the trial judge's conclusion that in a statewide election the only way a court can order a manual recount of ballots that were allegedly not counted because of some irregularity or inaccuracy in the balloting or counting process is to order that the votes in all counties in which those processes were used be recounted. I do not find any legal basis for the majority of this Court to simply cast aside the determination by the trial judge made on the proof presented at a two-day evidentiary hearing that the evidence did not support a statewide

recount. To the contrary, I find the majority's decision in that regard quite extraordinary.

Section 102.168(3), Florida Statutes (2000), states in pertinent part:

The grounds for contesting an election under this section are:

....

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(Emphasis added.) In other words, to establish a cause of action, plaintiff must allege an irregularity that places in doubt the result of the election. First, to ~contest™ simply means to challenge. See Webster's Dictionary 250 (10th ed. 1994). Second, section 102.168(5), provides:

A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(Emphasis added.) Upon my reading of the statute, I conclude that the language ~grounds of contest™ unambiguously means: a basis upon which a plaintiff can establish a cause of action. This standard is simply the threshold that must be met to bring forth the contest action. Thus, this standard is not the standard that the judge must use in deciding whether a plaintiff who brings the contest has successfully met his or her burden to order a recount or set aside election results.

Although it is unclear from case law what standard must be satisfied in order to grant appropriate relief, it undoubtedly cannot be a low standard. Recently, in Beckstrom, this Court declined to invalidate an election despite a finding that the canvassing board was grossly negligent and in substantial noncompliance with the absentee voting statutes. See Beckstrom. Thus, merely stating the cause of action under the contest statute does not entitle a party to a recount or require the court to set aside an election. More must be required. This is especially true here, where, as in Beckstrom, the trial judge found no dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes. Thus, a plaintiff's burden in establishing grounds on which a circuit judge could order relief of any kind was simply not met. It is illogical to interpret section 102.168(3)(c) to set such a low standard where a plaintiff merely has to allege a cause of action to successfully carry the contest.²⁷

Furthermore, even conceding that the trial judge at the outset applied an erroneous "probability of doubt" standard in deciding that plaintiffs failed to meet their burden of establishing a cause of action, the trial judge faced a conundrum

²⁷In addition, under a protest the threshold that must be met to order a recount must be lower than that under a contest, which action can only be brought after certification of the returns. Therefore, the threshold to successfully carry a contest must be higher than that of a mere protest.

that must be adequately explained. Plaintiffs asked the trial judge to grant the very remedy a recount of the under-votes he prays for without first establishing that remedy was warranted. Before any relief is granted, a plaintiff must allege that enough legal votes were rejected to place in doubt the results of the election. However, in order for the plaintiffs to meet this burden, the under-vote ballots must be preliminarily manually recounted. Following this logic to its conclusion would require a circuit court to order partial manual recounts upon the mere filing of a contest. This proposition plainly has no basis in law.

As I have stated, I conclude in the case at bar that sections 102.166 and 106.168 must be read in *pari materia*. My analysis in this regard is bolstered in situations, as here, where there was an initial protest filed in a county pursuant to section 102.166 and a subsequent contest of that same county's return pursuant to section 102.168. It appears logical to me that a circuit judge in a section 102.168 contest should review a county canvassing board's determinations in a section 102.166 protest under an abuse-of-discretion standard. I see no other reason why the county canvassing board would be a party defendant if the circuit court is not intended to evaluate the canvassing board's decisions with respect to manual recount decisions made in a section 102.166 protest. Finally, it is plain to me that it is only in section 102.166 that there are any procedures for manual recounts

which address the logistics of a recount, including who is to conduct the count, that it is to take place in public, and what is to be recounted.²⁸

The majority quotes section 101.5614(5) for the proposition of settling how a county canvassing board should count a vote. The majority states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."TM 101.5614(5), Fla. Stat. (2000). Section 101.5614(5), however, is a statute that authorizes the creation of a duplicate ballot where a "ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment."TM There is no basis in this record that suggests that the approximately 9000 ballots from Miami-Dade County were damaged or defective.

Laying aside this problem and assuming the majority is correct that section 101.5614(5) correctly annunciates the standard by which a county canvassing board should judge a questionable ballot, section 101.5614(5) utterly fails to provide any meaningful standard. There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter."TM The problem

²⁸I am persuaded that even with these procedures manual recounts by the canvassing board are constitutionally suspect. See Touchston v. McDermott, No. 00-15985 (U.S. 11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting). This would be compounded by giving that power to an individual circuit judge and providing him or her with no standards.

is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a ~dimpled chad™ where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.²⁹

Based upon this analysis and adhering to the interpretation of the 1992 Hogan case, I conclude the circuit court properly looked at what the county canvassing boards have done and found that they did not abuse their discretion. Regarding Miami-Dade County, I find that the trial judge properly concluded that the Miami-Dade Canvassing Board did not abuse its discretion in deciding to discontinue the manual recount begun on November 19, 2000. Evidence presented at trial indicated that the Miami-Dade Board made three different decisions in respect to manual recounts. The first decision was not to count, the second was to count, and the third was not to count. The third decision was based upon the determination by the Miami-Dade Board that it could not make the

²⁹See n. 5.

November 26, 2000, deadline set by this Court in Harris and that it did not want to jeopardize disenfranchising a segment of its voters. The law does not require futile acts. See Haimovitz v. Robb, 130 Fla. 844; 178 So. 827 (1937). Section 102.166(5)(c) requires that, if there is a manual recount, all of the ballots have to be recounted. I cannot find that the Miami-Dade Board's decision that all the ballots could not be manually recounted between November 22 and November 26, 2000, to be anything but a decision based upon reality. Moreover, not to count all of the ballots if any were to be recounted would plainly be changing the rules after the election and would be unfairly discriminatory against votes in the precincts in which there was no manual recount. Thus, I agree with the trial court that the Miami-Dade Board did not abuse its discretion in discontinuing the manual recount.

In respect to the Palm Beach County Canvassing Board, I likewise find that the trial judge did not err in finding that the Palm Beach Board was within its discretion in rejecting the approximately 3300 votes in which it could not discern voter intent. As set forth in Boardman, the county canvassing boards are vested with the responsibility to make judgments on the validity of ballots, and its determinations will be overturned only for compelling reasons when there are

clear, substantial departures from essential requirements of law. See id., 323 So. 2d at 268 n 5. Petitioners have not met this burden.

I also agree with the trial judge that the Election Canvassing Commission (Commission) did not abuse its discretion in refusing to accept either an amended return reflecting the results of a partial manual recount or a late amended return filed by the Palm Beach Board. I conclude that it is plain error for the majority to hold that the Commission abused its discretion in enforcing a deadline set by this Court that recounts be completed and certified by November 26, 2000. I conclude that this not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000.

As I stated at the outset, I conclude that this contest simply must end.

Directing the trial court to conduct a manual recount of the ballots violates article II, section 1, clause 2 of the United States Constitution, in that neither this Court nor the circuit court has the authority to create the standards by which it will count the under-voted ballots. The Constitution reads in pertinent part: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."TMArt. II, " 1, cl. 2, U.S. Const. The Supreme Court has described this authority granted to the state legislatures as "plenary."TMSee McPherson v. Blacker, 146 U.S. 1, 7 (1892). "Plenary"TMs defined as "full, entire,

complete, absolute, perfect, [and] unqualified.TMBlack's Law Dictionary 1154 (6th ed. 1990).

The Legislature has given to the county canvassing boards and only these boards the authority to ascertain the intent of the voter. See § 102.166(7)(b), Fla. Stat. (2000). Just this week, the United States Supreme Court reminded us of the teachings from Blacker when it said:

[Art. II, § 1, cl. 2] does not read that the people or the citizens shall appoint, but that each State shall; and if the words in such manner as the legislature thereof may direct, had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.TM

Bush v. Palm Beach Canvassing Bd., No. 00-836, slip op. at 4-5 (U.S. Dec. 4, 2000) (quoting Blacker, 146 U.S. at 7). Clearly, in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide. This Court's order to do so appears to me to be in conflict with the United States Supreme Court decision.

Laying aside the constitutional infirmities of this Court's action today, what the majority actually creates is an overflowing basket of practical problems. Assuming the majority recognizes a need to protect the votes of Florida's

presidential electors,³⁰ the entire contest must be completed ~at least six days beforeTM December 18, 2000, the date the presidential electors meet to vote. See 3 U.S.C. ~ 5 (1994). The safe harbor deadline day is December 12, 2000. Today is Friday, December 8, 2000. Thus, under the majority's time line, all manual recounts must be completed in five days, assuming the counting begins today.

In that time frame, all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public.³¹ Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who were able to correctly cast their ballots on election day.

Another significant problem is that the majority returns this case to the circuit court for a recount with no standards. I do not, and neither will the trial

³⁰As the Supreme Court recently noted, 3 U.S.C ~ 5 creates a safe harbor provision regarding congressional consideration of a state's electoral votes should all contests and controversies be resolved at least six days prior to December 18, 2000, if made pursuant to the state of the law as it existed on election day. See Bush at 6. There is no legislative suggestion that the Florida Legislature did not want to take advantage of this safe harbor provision.

³¹See ~ 102.166(6), Fla. Stat. (2000).

judge, know whether to count or not count ballots on the criteria used by the canvassing boards, what those criteria are, or to do so on the basis of standards divined by Judge Sauls. A continuing problem with these manual recounts is their reliability. It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various canvassing boards, individual judges, or multiple unknown counters who will eventually count these ballots.

I must regrettably conclude that the majority ignores the magnitude of its decision. The Court fails to make provision for: (1) the qualifications of those who count; (2) what standards are used in the count are they the same standards for all ballots statewide or a continuation of the county-by-county constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a counter; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

This Court's responsibility must be to balance the contest allegations against the rights of all Florida voters who are not involved in election contests to

have their votes counted in the electoral college. To me, it is inescapable that there is no practical way for the contest to continue for the good of this country and state.

I am persuaded that Justice Terrell was correct in 1936 when he said:

This court is committed to the doctrine that extraordinary relief will not be granted in case where it plainly appears that although the complaining party may be ordinarily entitled to it, if the granting of such relief in the particular case will result in confusion and disorder and will produce an injury to the public which outweighs the individual right of the complainant to have the relief he seeks.

State v. Wester, 126 Fla. 49, 54, 170 So. 736, 738-39 (1936) (citations omitted; emphasis added).

For a month, Floridians have been working on this problem. At this point, I am convinced of the following.

First, there have been an enormous number of citizens who have expended heroic efforts as members of canvassing boards, counters, and observers, and as legal counsel who have in almost all instances, in utmost good faith attempted to bring about a fair resolution of this election. I know that, regardless of the outcome, all of us are in their debt for their efforts on behalf of representative democracy.

Second, the local election officials, state election officials, and the courts have been attempting to resolve the issues of this election with an election code which any objective, frank analysis must conclude never contemplated this circumstance. Only to state a few of the incongruities, the time limits of sections 102.112, 102.166, and 102.168 and 3 U.S.C. — 1, 5, and 7 simply do not coordinate in any practical way with a presidential election in Florida in the year 2000. Therefore, section 102.168, Florida Statutes, is inconsistent with the remedy being sought here because it is unclear in a presidential election as to: (1) whether the candidates or the presidential electors should be party to this election contest; (2) what the possible remedy would be; and (3) what standards to apply in counting the ballots statewide.

Third, under the United States Supreme Court's analysis in Bush v. Palm Beach County Canvassing Board, wherein the Supreme Court calls to our attention McPherson v. Blacker, 146 U.S. 1 (1892), there is uncertainty as to whether the Florida Legislature has even given the courts of Florida any power to resolve contests or controversies in respect to presidential elections.

Fourth, there is no available remedy for the petitioners on the basis of these allegations. Quite simply, courts cannot fairly continue to proceed without

jeopardizing the votes and rights of other citizens through a further count of these votes.

I must take seriously the counsel of the Supreme Court in Bush:

Since [3 U.S.C.] § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Id. at 6.

This case has reached the point where finality must take precedence over continued judicial process. I agree with a quote from John Allen Paulos, a professor of mathematics at Temple University, when he wrote that, "[t]he margin of error in this election is far greater than the margin of victory, no matter who wins."³² Further judicial process will not change this self-evident fact and will only result in confusion and disorder. Justice Terrell and this Court wisely counseled against such a course of action sixty-four years ago. I would heed that sound advice and affirm Judge Sauls.

³²The election is a tie, so let's get on with it,TM St. Petersburg Times, Dec. 3, 2000, at 3D.

HARDING, J., dissenting.

I would affirm Judge Sauls—order because I agree with his ultimate conclusion in this case, namely that the Appellants failed to carry their requisite burden of proof and thus are not entitled to relief. However, in reaching his conclusion, Judge Sauls applied erroneous standards in two instances. First, in addressing the Appellants—challenges of the election certifications in Miami-Dade and Palm Beach Counties, the judge stated that “[t]he local boards have been given broad discretion, which no court may overrule, absent a clear abuse of discretion.”TMApplying this standard, the judge concluded that the Miami-Dade County Canvassing Board did not abuse its discretion in any of its decisions in the review and recounting process. While abuse of discretion is the proper standard for assessing a canvassing board’s actions in a section 102.166 protest proceeding, it is not applicable to this section 102.168 contest proceeding. Judge Sauls improperly intertwined these two proceedings and the standards applicable to each.

In 1999, the Florida Legislature extensively amended the contest statute to specify the grounds authorized for contesting an election and to set up a time frame for contests. See ch. 99-339, “ 3, at 3547-49, Laws of Fla. The Legislature also amended the protest statute by eliminating the role of the circuit courts in

protest proceedings. See id., ¶ 1, at 3546. The county canvassing boards have been granted discretion to authorize a manual recount when requested by a candidate, political party, or political committee who seeks to protest the returns of an election as being erroneous. See ¶ 102.166(4)(c), Fla. Stat. (2000) (“The county canvassing board may authorize a manual recount.”)(emphasis added).

In contrast, a contest proceeding involves a legal challenge to the outcome of an election. The circuit judge is statutorily charged with three tasks in a contest proceeding: (1) to ensure that each allegation in the contestant’s complaint is investigated, examined, or checked; (2) to prevent or correct any alleged wrong; and (3) to provide any relief appropriate under such circumstances. See ¶ 102.168(8), Fla. Stat. (2000). Where a contestant alleges that the canvassing board has rejected a number of legal votes “sufficient to change or place in doubt the result of the election” due to the board’s decision to curtail or deny a manual recount, the circuit judge should examine this issue de novo and not under an abuse of discretion standard. ¶ 102.168(3)(c), Fla. Stat. (2000).

Second, Judge Sauls erred in concluding that a contestant under section 102.168(3)(c) must show a “reasonable probability that the results of the election would have been changed.” Judge Sauls cited the First District Court of Appeal’s decision in Smith v. Tynes, 412 So. 2d 925, 926 (Fla. 1st DCA 1982), as

establishing this standard for election contests. However, as discussed above, when the Legislature amended section 102.168 in 1999, it specified five grounds for contesting an election, including the “[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.TM(Emphasis added.) Smith v. Tynes, which was decided in 1982, addressed the pre-amendment statute which did not specify the grounds for a contest. Thus, the current statutory standard controls here.

While I disagree with Judge Sauls on the standards applicable to this election contest, I commend him for the way that he conducted the proceedings below under extreme time constraints and pressure. Further, I believe that Judge Sauls properly concluded that there was no authority to include the Palm Beach County returns filed after the explicit deadline established by this Court.

I conclude that the application of the erroneous standards is not determinative in this case. I agree with Judge Sauls that the Appellants have not carried their burden of showing that the number of legal votes rejected by the canvassing boards is sufficient to change or place in doubt the result of this statewide election. That failure of proof controls the outcome here. Moreover, as explained below, I do not believe that an adequate remedy exists under the circumstances of this case.

I conclude that Judge Sauls properly found that the evidence presented by Appellants, even if believed, was insufficient to warrant any remedy under section 102.168.

The basis for Appellants claim for relief under section 102.168 is that there is a ~no-vote™ problem, i.e., ballots which, although counted by machines at least once, allegedly have not been counted in the presidential election. The evidence showed that this no-vote problem, to the extent it exists, is a statewide problem.³³ Appellants ask that only a subset of these no-votes be counted.

In a presidential election, however, section 102.168, by its title, is an ~Election™ contest and, as such, it is not a local contest seeking to define the correct winner of the popular vote in any individual county. The action is to determine whether the Secretary of State certified the correct winner for the entire State of Florida. By its plain language, section 102.168(1) provides that only the ~unsuccessful candidate™ may contest an election. If this contest provision may be invoked as to individual county results, as argued by Appellants, then Vice

³³ No-votes (ballots for which the no vote for Presidential electors was recorded) exist throughout the state, not just in the counties selected by Appellants. Of the 177,655 no-votes in the November 7, 2000, election in Florida, 28,492 occurred in Miami-Dade County and 29,366 occurred in Palm Beach County. See Division of Elections, Voter Turnout Report, S-DX 41; Division of Elections, General Election Results, S-DX 40.

President Gore's choice of the three particular counties was improper because he was not ~unsuccessfulTM in those counties. I read the statute as applying to statewide results in statewide elections. Thus, Vice President Gore, as the unsuccessful candidate statewide, could contest the election results. However, in this contest proceeding, Appellants had an obligation to show, by a preponderance of the evidence, that the outcome of the statewide election would likely be changed by the relief they sought.

Appellants failed, however, to provide any meaningful statistical evidence that the outcome of the Florida election would be different if the ~no-voteTM in other counties had been counted; their proof that the outcome of the vote in two counties would likely change the results of the election was insufficient. It would be improper to permit Appellants to carry their burden in a statewide election by merely demonstrating that there were a sufficient number of no-votes that could have changed the returns in isolated counties. Recounting a subset of counties selected by the Appellants does not answer the ultimate question of whether a sufficient number of uncounted legal votes could be recovered from the statewide ~no-votesTM to change the result of the statewide election. At most, such a procedure only demonstrates that the losing candidate would have had greater success in the subset of counties most favorable to that candidate.

Moreover, assuming that there may be some shortfall in counting the votes cast with punch card ballots, such a problem is only properly considered as being systemic with the punch card system itself, and any remedy would have had to be statewide. Any other remedy would disenfranchise tens of thousands of other Florida voters, as I have serious concerns that Appellant's interpretation of 102.168 would violate other voters' rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

As such, I would find that the selective recounting requested by Appellant is not available under the election contest provisions of section 102.168. Such an application does not provide for a more accurate reflection of the will of the voters but, rather, allows for an unfair distortion of the statewide vote. It is patently unlawful to permit the recount of ~no-votes™ in a single county to determine the outcome of the November 7, 2000, election for the next President of the United States. We are a nation of laws, and we have survived and prospered as a free nation because we have adhered to the rule of law. Fairness is achieved by following the rules.

Finally, even if I were to conclude that the Appellant's allegations and evidence were sufficient to warrant relief, I do not believe that the rules permit an

adequate remedy under the circumstances of this case. This Court, in its prior opinion, and all of the parties agree that election controversies and contests must be finally and conclusively determined by December 12, 2000. See 3 U.S.C. § 5. This Court is not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief.TMState v. Strasser, 445 So. 2d 322, 322 (Fla. 1983). See also Hoshaw v. State, 533 So. 2d 886, 887 (Fla. 3d DCA 1988) (~The law does not require futile acts.TM); International Fidelity Ins. Co. v. Prestige Rent-A-Car, Inc., 715 So. 2d 1025, 1028 (Fla. 5th DCA 1998) (~Florida law does not require trial courts to enter orders which are impossible to execute or which require parties to perform acts that cannot be of any force or effect.TM). Clearly, the only remedy authorized by law would be a statewide recount of more than 170,000 ~no-voteTM ballots by December 12. Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions. In order to undertake this unprecedented task, the majority has established standards for manual recounts a step that this Court refused to take in an earlier case,³⁴ presumably because there was no authority for such action and nothing in the

³⁴ See Palm Beach County Canvassing Bd. v. Harris, Nos. SC00-2346, SC00-2348, SC00-2349 (Fla. Nov. 21, 2000), vacated by Bush v. Palm Beach Canvassing Bd., 531 U.S. ____ (2000).

record to guide the Court in setting such standards. The same circumstances exist in this case. All of the parties should be afforded an opportunity to be heard on this very important issue.

While this Court must be ever mindful of the Legislature's plenary power to appoint presidential electors, see U.S. Const. art. II, § 1, cl. 2, I am more concerned that the majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos. In giving Judge Sauls the option to order a statewide recount, the majority permits a remedy which was not prayed for, which is based upon a premise for which there is no evidence, and which presents Judge Sauls with options to order entities (i.e. local canvassing boards) to conduct recounts when they have not been served, have not been named as parties, but, most importantly, have not had the opportunity to be heard. In effect, the majority is allowing the results of the statewide election to be determined by the manual recount in Miami-Dade County because a statewide recount will be impossible to accomplish. Even if by some miracle a portion of the statewide recount is completed by December 12, a partial recount is not acceptable. The uncertainty of the outcome of this election will be greater under the remedy afforded by the majority than the uncertainty that now exists.

The circumstances of this election call to mind a quote from football coaching legend Vince Lombardi: “We didn’t lose the game, we just ran out of time.”™

SHAW, J., concurs.

Appeal of Judgment of Circuit Court, in and for Leon County, N. Sanders Sauls, Judge, Case No. CV 00-2808 - Certified by the District Court of Appeal, First District, Case No. 1D00-4745

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Nassau County Canvassing Board, and Judge Robert E. Williams, Supervisor of Elections, Shirley N. King, Marianne P. Marshall, and David Howard; Leonard Berger and Andrew McMahon, Palm Beach County, West Palm Beach, Florida, for Charles Burton, Carol Roberts, and Theresa Lepore, Palm Beach County Canvassing Board, and Bruce Rogow and Beverly A. Pohl, Fort Lauderdale, Florida, and Robert M. Montgomery, Jr., West Palm Beach, Florida, for Theresa Lepore, Supervisor of Elections; and Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida, Benjamin L. Ginsberg of Patton, Boggs, LLP, Washington, D.C., George J. Terwilliger, III, and Timothy E. Flanigan of White & Case, LLP, Washington, D.C., and Kirk Van Tine of Baker Botts, LLP, Washington, D.C., for George W. Bush and Dick Cheney,

Appellees

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December 11, 2000

Clarification of case remanded from the U.S. Supreme Court

Supreme Court of Florida

Nos. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, etc., et al.,
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, et al.,
Appellants,
vs.
KATHERINE HARRIS, etc., et al.,
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, etc., et al.,
Appellees.

[December 11, 2000]

PER CURIAM.

This case is before the Court on remand from the United States Supreme Court.¹ We respond to several issues raised by the United States Supreme Court as explained herein.²

I. FACTS

On Tuesday, November 7, 2000, the State of Florida, along with the rest of the nation, conducted a general election for the President of the United States. The Florida Division of Elections (“Division”) reported on Wednesday, November 8, that Governor George W. Bush, the Republican candidate, had received 2,909,135 votes and Vice President Albert Gore Jr., the Democratic candidate, had received 2,907,351 votes. Because the overall difference in the total votes cast for each

¹ See Bush v. Palm Beach Canvassing Bd., 69 U.S.L.W. 4020 (2000).

² In its December 4, 2000, opinion and mandate, the Supreme Court of the United States remanded this case for further proceedings. On December 4, 2000, this Court entered its order authorizing all parties to file Supplemental Briefs directed to the implementation of the Mandate, and Briefs were filed on December 5, 2000, and considered by the Court. In the interim, this Court received Briefs and conducted Oral Argument on December 7, 2000, in the case of Gore v. Harris, No. SC00-2431 (Fla. Dec. 8, 2000), which also required immediate attention. We thereafter rendered our decision on December 8, 2000, which is presently under review by the Supreme Court of the United States. While recognizing the dissent in this case does not agree with release of this opinion at this time, we have issued this decision as expeditiously as possible under the foregoing time constraints in order to timely respond to the questions presented by the Supreme Court of the United States in the December 4, 2000, opinion and its remand instructions.

candidate was less than one-half of one percent of the total votes cast for that office, an automatic recount was conducted.³ The recount resulted in a reduced figure for the overall difference between the two candidates.

A. The Manual Recounts

In light of the closeness of the election, the Florida Democratic Executive Committee, on Thursday, November 9, requested that manual recounts be conducted in Broward, Miami-Dade, Palm Beach, and Volusia Counties. The county canvassing boards (“Boards”) of these counties conducted sample manual recounts of at least one percent of the ballots cast. Several of the Boards determined that the manual recounts showed “an error in the vote tabulation which could affect the outcome of the election,” and the Boards voted to conduct countywide manual recounts. See § 102.166(5), Fla. Stat. (2000).

Because the Palm Beach County Canvassing Board was concerned that the recounts would not be completed prior to the seven day deadline set forth in sections 102.111 and 102.112, Florida Statutes (2000), the Board sought an advisory opinion from the Division. The Division issued Advisory Opinion DE 00-10 wherein the Division advised the Board that absent unforeseen circumstances the county’s returns must be received by 5 p.m. on the seventh day following the

³ See § 102.141(4), Fla. Stat.(2000).

election in order to be included in the certification of statewide results.

Relying on this advisory opinion, the Florida Secretary of State (“Secretary”) on Monday, November 13, issued a statement wherein she announced that she would ignore returns of manual recounts received by the Florida Department of State (“Department”) after 5 p.m., Tuesday, November 14. The Volusia County Canvassing Board on Monday, November 13, filed suit in circuit court in Leon County, seeking declaratory and injunctive relief; the candidates and the Palm Beach County Canvassing Board were allowed to intervene.

B. The Legal Proceedings

The trial court ruled on Tuesday, November 14, that the deadline was mandatory but that the Volusia Board could amend its returns at a later date and that the Secretary, after “considering all attendant facts and circumstances,” could exercise her discretion in determining whether to ignore the amended returns. Later that day, the Volusia Board filed a notice of appeal and the Palm Beach Board filed a notice of joinder in the appeal.

Subsequent to the circuit court’s order, the Secretary announced that she was in receipt of certified returns (i.e., the returns resulting from the initial recount) from all counties in the state. The Secretary then instructed Florida’s Supervisors of Elections (“Supervisors”) that they must submit to her by 2 p.m., Wednesday,

November 15, a written statement of “the facts and circumstances” justifying any belief on their part that they should be allowed to amend the certified returns previously filed. After considering the reasons in light of specific criteria,⁴ the

⁴The criteria considered by the Secretary are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott v. Harris, No. 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000).

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates’ names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) (“[M]ere confusion does not amount to an impediment to the voters’ free choice if reasonable time and study will sort it out.”).

3. Where there is nothing “more than a mere possibility that the outcome of the election would have been effected.” Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Secretary, on Wednesday, November 15, rejected the reasons and again announced that she would not accept the amended returns but rather would rely on the earlier certified totals for the four counties. The Secretary further stated that after she received the certified returns of the overseas absentee ballots from each county she would certify the results on Saturday, November 18.

On Thursday, November 16, the Florida Democratic Party and Vice President Gore filed a motion in circuit court in Leon County, seeking to compel the Secretary to accept amended returns. After conducting a hearing, the court denied relief in a brief order dated Friday, November 17. Both the Democratic Party and Vice President Gore appealed. The First District Court of Appeal certified both of the underlying trial court orders to this Court via the Court's "pass-through" jurisdiction. By orders dated Friday, November 17, this Court accepted jurisdiction, set an expedited briefing schedule, and enjoined the Secretary and the Elections Canvassing Commission ("Commission") from certifying the results of the presidential election until further order of this Court.

This Court on Tuesday, November 21, issued an opinion reversing the trial court's order based on the following analysis: Due to several ambiguities in the Florida Election Code ("Code"), the Court determined that legislative intent as

Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000).

discerned through traditional rules of statutory construction dictated a remedy based on the particular facts of this case.⁵ Bush sought certiorari review before the United States Supreme Court and that Court vacated this Court's judgment and remanded for proceedings consistent with its opinion.⁶

II. ISSUES

The questions before this Court include the following: Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); and under what circumstances should the Secretary and Commission accept such recounts when the returns are certified and submitted by

⁵ See Palm Beach County Canvassing Bd. v. Harris, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000).

⁶ The United States Supreme Court ruled as follows:

After reviewing the opinion of the Florida Supreme Court, we find "that there is considerable uncertainty as to the precise grounds for the decision." This is sufficient reason for us to decline at this time to review the federal questions asserted to be present. . . . Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5. The judgment of the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Bush v. Palm Beach County Canvassing Bd., 69 U.S.L.W. 4020, 4021 (2000) (citation omitted).

the Board after the seven day deadline set forth in sections 102.111 and 102.112?⁷

III. THE APPLICABLE LAW

A fundamental principle governing presidential election law in the United States is set forth in article II, section 1, United States Constitution, which confers on state legislatures the power to regulate the appointment of presidential electors:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or profit under the United States shall be appointed an Elector.

U.S. Const. art. II, § 1 (emphasis added). The United States Supreme Court explained the import of this clause vis-a-vis state constitutions:

The clause under consideration does not read that the people or the citizens shall appoint, but that “each state shall”; and if the words “in such manner as the legislature thereof may direct,” had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

⁷ None of the parties have raised as an issue on appeal the constitutionality of Florida’s election laws.

McPherson v. Blacker, 146 U.S. 1, 25 (1892).

Although the Constitution vested the power to appoint the presidential electors “in such Manner as the Legislature . . . may direct,” McPherson also made clear that the electors

may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large . . . and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the state, or any other agent of its will, to appoint these electors.

McPherson, 146 U.S. at 34-35 (emphasis added). In this State, at least since 1847, the right to elect the President of the United States has been firmly vested in the citizens of this State by the Legislature. As section 103.011, Florida Statutes (2000), provides:

Electors of President and Vice President, known as presidential electors shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4.

(Emphasis added.)

The United States Congress also has provided that where any dispute concerning the appointment of electors is settled at least six days prior to the date set for the meeting of electors and is done so pursuant to state laws enacted prior to the date of election, the state’s conclusion concerning the settlement of such

disputes is conclusive:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (1994) (emphasis added). Consistent with the above provisions of federal law and with longstanding principles of state law, the Florida Legislature in 1951 enacted the Florida Election Code, contained in chapters 97–106, Florida Statutes (2000), which sets forth uniform criteria regulating elections in this state and which provides methods and procedures, including judicial methods and procedures, for the final determination of any controversy or contest concerning the appointment of all or any of the electors of this state.

IV. LEGISLATIVE INTENT

Legislative intent—as always—is the polestar that guides a court’s inquiry into the provisions of the Florida Election Code. See Florida Birth-Related

Neurological Injury Compensation Ass’n v. Florida Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997). Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code. See Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064 (Fla. 1995). As noted above, however, chapter 102 is unclear and in conflict in several respects. In light of these ambiguities, the Court must resort to traditional rules of statutory construction to determine legislative intent. See Capers v. State, 678 So. 2d 330 (Fla. 1996).

V. LEGAL OPINION OF THE DIVISION OF ELECTIONS

The first issue this Court must resolve is whether a County Board may conduct a countywide manual recount where it determines there is an error in vote tabulation that could affect the outcome of the election. Here, the Division issued opinion DE 00-13, which construed the language “error in vote tabulation” to exclude the situation where a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched.

Florida courts generally will defer to an agency’s interpretation of statutes and rules the agency is charged with implementing and enforcing. See Donato v. American Tel. & Tel. Co., 767 So. 2d 1146, 1153 (Fla. 2000); Smith v. Crawford,

645 So. 2d 513, 521 (Fla. 1st DCA 1994). Florida courts, however, will not defer to an agency's opinion that is contrary to law. See Donato, 767 So. 2d at 1153; Nikolits v. Nicosia, 682 So. 2d 663, 666 (Fla. 4th DCA 1996). We conclude that the Division's advisory opinion regarding vote tabulation is contrary to law because it contravenes the plain meaning of section 102.166(5).

Pursuant to section 102.166(4)(a), a candidate who appears on a ballot, a political committee that supports or opposes an issue that appears on a ballot, or a political party whose candidate's name appeared on the ballot may file a written request with the County Board for a manual recount. This request must be filed with the Board before the Board certifies the election results or within seventy-two hours after the election, whichever occurs later.⁸ Upon filing the written request for a manual recount, the canvassing board may authorize a manual recount.⁹ The decision whether to conduct a manual recount is vested in the sound discretion of the Board.¹⁰ If the canvassing board decides to authorize the manual recount, the recount must include at least three precincts and at least one percent of the total votes cast for each candidate or issue, with the person who requested the recount

⁸ § 102.166(4)(b), Fla. Stat. (2000).

⁹ § 102.166(4)(c), Fla. Stat. (2000).

¹⁰ See Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

choosing the precincts to be recounted.¹¹ If the manual recount indicates an “error in the vote tabulation which could affect the outcome of the election,” the county canvassing board “shall”:

- (a) Correct the error and recount the remaining precincts with the vote tabulation system;
- (b) Request the Department of State to verify the tabulation software; or
- (c) Manually recount all ballots.

§ 102.166(5)(a)-(c), Fla. Stat. (2000) (emphasis added).

The issue in dispute here is the meaning of the phrase "error in the vote tabulation" found in section 102.166(5). The Division opines that an “error in the vote tabulation” only means a counting error resulting from incorrect election parameters or an error in the vote tabulating software. We disagree.

The plain language of section 102.166(5) refers to an error in the vote tabulation rather than the vote tabulation system. On its face, the statute does not include any words of limitation; rather, it provides a remedy for any type of mistake made in tabulating ballots. The Legislature has utilized the phrase "vote tabulation system" and "automatic tabulating equipment" in section 102.166 when it intended to refer to the voting system rather than the vote count. Equating "vote tabulation" with "vote tabulation system" obliterates the distinction created in section 102.166

¹¹ See § 102.166(4)(d), Fla. Stat. (2000).

by the Legislature.

Sections 101.5614(5) and (6) also support the proposition that the "error in vote tabulation" encompasses more than a mere determination of whether the vote tabulation system is functioning. Section 101.5614(5) provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Conversely, section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded. Taken together, these sections suggest that "error in the vote tabulation" includes errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery.

Moreover, section 102.141(4), which outlines the Board's responsibility in the event of a recount, states that the Board "shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast." § 102.141, Fla. Stat. (2000). Therefore, an "error in the vote tabulation" includes a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count of a sampling of precincts pursuant to section 102.166(4).

Although error cannot be completely eliminated in any tabulation of the

ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Thus, we find that the Division's opinion DE 00-13 regarding the ability of county canvassing boards to authorize a manual recount is contrary to the plain language of the statute.

Having concluded that the county canvassing boards have the authority to order countywide manual recounts, we must now determine whether the Commission¹² must accept amended returns filed after the seven-day deadline set forth in sections 102.111 and 102.112 under the circumstances presented.

VI. AMENDED RETURNS

A. Statutory Ambiguity

In regard to this case, the provisions of the Code are ambiguous in the following areas. First, the deadline for submitting county returns to the

¹² The Commission is composed of the Secretary of State, the Director of the Division of Elections, and the Governor. See § 102.111, Fla. Stat. In this instance, Florida Governor Jeb Bush has removed himself from the Commission because his brother, Texas Governor George W. Bush, is the Republican candidate for President of the United States. Robert Crawford, Florida Commissioner of Agriculture, has been appointed to replace Florida Governor Jeb Bush. See § 102.111, Fla. Stat. (2000).

Department under sections 102.111 and 102.112 is in conflict with the time frame for conducting manual recounts under section 102.166(4).¹³ Second, the language in sections 102.111 and 102.112, authorizing the Secretary to ignore amended or late returns submitted by the Boards, is contradictory.

1. The Recount Conflict

Section 102.166(1) states that "[a]ny candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest." The time period for filing a protest is "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later." § 102.166(2), Fla. Stat. (2000).

Section 102.166(4)(a), the operative subsection in this case, further provides that, in addition to any protest, "any candidate whose name appeared on the ballot . . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount" accompanied by the "reason that the manual recount is being requested." Section

¹³ We emphasize that because the certification of the Elections Canvassing Commission and the deadlines in Sections 102.111 and 102.112 apply only in the case of statewide and federal elections, the conflict between the two statutes exists only for those elections and not for local or county elections.

102.166(4)(b) further provides that the written request may be made prior to the time the Board certifies the returns or within seventy-two hours after the election, whichever occurs later.¹⁴

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.

¹⁴As discussed in Siegel v. LePore, No. 00-9009-CIV, 2000 WL 1687185 at *6 (S.D. Fla. Nov. 13, 2000), aff'd, No. 00-15981, 2000 WL 1781946 (11th Cir. Dec. 6, 2000):

On its face, the manual recount provision does not limit candidates access to the ballot or interfere with voters' right to associate or vote. Instead the manual recount provision is intended to safeguard the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of election ballots. While discretionary in its application, the provision is not wholly standardless. Rather, the central purpose of the scheme, as evidenced by its plain language, is to remedy "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. §102.166(5). In this pursuit, the provision strives to strengthen rather than dilute the right to vote by securing, as nearly as humanly possible, an accurate and true reflection of the will of the electorate. Notably, the four county canvassing boards [that were] challenged in this suit have reported various anomalies in the initial automated count and recount. The state manual recount provision therefore serves important governmental interests.

§ 102.166, Fla. Stat. (2000) (emphasis added).

A Board “may” authorize a manual recount¹⁵ and such a recount must include at least three precincts and at least one percent of the total votes cast for the candidate.¹⁶ The following procedure then applies:

(5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

(6) Any manual recount shall be open to the public.

(7) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.

(b) If a counting team is unable to determine a voter’s intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter’s intent.

¹⁵ The statute does not set forth any criteria for determining when a manual recount is appropriate. See § 102.166(4)(c), Fla. Stat. (2000) (“The county canvassing board may authorize a manual recount.”).

¹⁶ § 102.166(4)(d), Fla. Stat. (2000).

§ 102.166, Fla. Stat. (2000).

Under this scheme, a candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the Code sets no specific deadline by which a manual recount must be completed, the time required to complete a manual recount must be reasonable.¹⁷ Otherwise, the recount provision would be, in effect, meaningless. Courts should construe statutes to give effect to all provisions, and not to render any part meaningless. See Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996). The recount provision thus conflicts with sections 102.111 and 102.112, which state that the Boards “must” submit their returns to the Elections Canvassing Commission by 5 p.m. of the seventh day following the election or face penalties. For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial manual recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by the deadline in sections 102.111 and 102.112, i.e., by 5 p.m. of the seventh day following the election.

¹⁷ What is a reasonable time required for completion will, in part, depend on whether the election is for a statewide office, for a federal office or for presidential electors. In the case of the presidential election, the determination of reasonableness must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000 as the date for final determination of any state's dispute concerning its electors in order for that determination to be given conclusive effect in Congress.

2. The “Shall” versus “May” Conflict

Section 102.111, which sets forth general criteria governing the Elections Canvassing Commission, was enacted in 1951 as part of the Code and provides that late returns “shall” be ignored:

102.111 Elections Canvassing Commission.—

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

§ 102.111, Fla. Stat. (2000) (emphasis added).

The Legislature in 1989 revised chapter 102 to include section 102.112, which provides that late returns “may” be ignored and that members of the County Board “shall” be fined:

102.112 Deadline for submission of county returns to the Department of State; penalties.—

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

(2) The department shall fine each board member \$200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines shall be deposited into the Election Campaign Financing Trust fund, created by s. 106.32.

(3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

§ 102.112, Fla. Stat. (2000) (emphasis added).

The above statutes conflict. Whereas section 102.111 is mandatory (i.e., the Department “shall” ignore late returns), section 102.112 is permissive (i.e., the Department “may” ignore late returns, or the Department “may” certify late returns and fine tardy Board members).

B. Resolving the Ambiguity

1. The Recount Conflict

It is well-settled that a statute should be construed in its entirety and as a

harmonious whole. See, e.g., Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961). Further, where two laws are in conflict, courts should adopt an interpretation that harmonizes the laws, for the Legislature is presumed to have intended that both laws are to operate co-extensively and have the fullest possible effect. See T.R. v. State, 677 So. 2d 270 (Fla. 1996). In the present case, whereas sections 102.111 and 102.112 state that County Boards must submit vote returns to the Department by 5 p.m. of the seventh day following an election, section 102.166(4) provides that a manual recount can be requested at any point prior to certification. Manual recounts oftentimes may be incomplete on the seventh day following the election. In such a case, if the seven-day limit were to be strictly enforced, the manual recount provision would be eviscerated and rendered meaningless. The Legislature could not have intended such a result. The seven-day limit thus must be construed in a flexible manner to accommodate the manual recount provision.

2. The “Shall” versus “May” Conflict

First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute. See, e.g., State ex rel. Johnson v. Vizzini, 227 So. 2d 205 (Fla. 1969). In the present case, whereas section 102.111 in its title and text addresses the general makeup and duties of the Elections

Canvassing Commission, the statute only tangentially addresses the penalty for late returns, noting that such returns “shall” be ignored by the Department. Section 102.112, on the other hand, directly addresses in its title and text both the “deadline” for submitting returns and the “penalties” for submitting late returns; the statute expressly states that late returns “may” be ignored and that dilatory Board members “shall” be fined. Based on the precision of the title and text, section 102.112 constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing late returns, and section 102.111 constitutes a non-specific statute in this regard. The specific statute controls the non-specific statute.

Second, it also is well settled that when two statutes are in conflict, the more recently enacted statute controls the older statute. See McKendry v. State, 641 So. 2d 45 (Fla. 1994). In the present case, the provision in section 102.111 stating that the Department “shall” ignore late returns was enacted in 1951 as part of the Code. On the other hand, the penalty provision in section 102.112 stating that the Department “may” ignore late returns was enacted in 1989 as a revision to chapter 102. The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.

Third, related statutory provisions must be read as a cohesive whole. See

Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961). A statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision. See Amente v. Newman, 653 So. 2d 1030 (Fla. 1995). As stated in Forsythe v. Longboat Key Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992), "all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with another."

Section 102.166 states that a candidate, political committee, or political party may request a manual recount any time before the county canvassing board certifies the results to the Department and, if the initial manual recount indicates a significant error, the Board "shall" conduct a countywide manual recount in certain cases. Thus, if a request is filed on the sixth day following an election and a full manual recount is required, the Board, through no fault of its own, will be unable to submit its returns to the Department by 5 p.m. of the seventh day following the election. In such a case, if the mandatory provision in section 102.111 were given effect, the votes of the county would be ignored for the simple reason that the Board was following the dictates of a different section of the Code. The Legislature could not have intended to penalize county canvassing boards for following the dictates of the Code.

And finally, when the Legislature enacted the Code, it envisioned that all votes cast during a particular election, including absentee ballots, would be submitted to the Department at one time. This, of course, is not possible because our state statutory scheme has been superseded by federal law governing overseas voters;¹⁸ overseas ballots must be counted if received no later than ten days following the election (i.e., the ballots do not have to be received by 7 p.m. of the day of the election, as provided by state law). In light of the fact that overseas ballots cannot be counted until after the seven-day deadline has expired, the mandatory language in section 102.111 has been supplanted by the permissive language of section 102.112. As reflected in a consent decree between the State of Florida and the United States Government, federal law requires counties to amend their returns to include overseas ballot totals and requires the Department to accept these totals.¹⁹ The overseas ballots must be received by counties up until midnight

¹⁸ See Fla. Admin. Code R.1S-2.013 (1998).

¹⁹ See United States v. Florida, No. TCA-80-1055 (N.D. 1982). Accordingly, Florida Administrative Code Rule 1S-2.013 provides in relevant part:

(7) With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election so long as such absentee ballot is otherwise proper. Overseas electors shall be informed by the supervisors of elections of the provisions of this rule,

on the tenth day following the election. In the present election, the earliest the county canvassing boards could have filed amended returns reflecting the overseas ballot totals was Saturday, November 18, 2000. The Secretary indicated that after receiving and totaling these amended returns, the Elections Canvassing Commission would certify the election on Saturday, November 18, 2000.

VII. THE DEPARTMENT'S DISCRETION

Consistent with the analysis above, we conclude that section 102.112 grants the Department discretion to ignore returns not received by the time specified in the statute. However, a plain reading of section 102.112 does not set forth boundaries of the exercise of this discretion. This case is not about whether there is a 5 p.m. deadline for filing returns. There is such a deadline. The trial court enforced that deadline and all county canvassing boards met that deadline. This case is about the “may ignore” portion of the statute and whether the Department acted within its discretion when the Secretary of State anticipatorily announced that she would not accept any amendments to the returns which had met the deadline thereby announcing that amended returns filed after the 5 p.m. deadline were to be ignored.

In a statewide or federal election other than a presidential election we can

i.e., the ten day extension provision for the presidential preference primary and the general election, and the provision for voting for the second primary.

foresee no reason why the Department would refuse to accept amended returns if a county was proceeding in good faith with a manual recount under section 102.166. However, in this case involving a presidential election, the decision as to when amended returns can be excluded from the statewide certification must necessarily be considered in conjunction with the contest provisions of section 102.168 and the deadlines set forth in 3 U.S.C. § 5. Therefore, in this case involving a presidential election, we conclude that the reasoned basis for the exercise of the Department's discretion to ignore amended returns is limited to those instances where failure to ignore the amended returns will: (1) preclude a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168²⁰; or (2) in the case of a federal election, will result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5.

VIII. THE PRESENT CASE

Based on the foregoing, we hold that the trial court below properly concluded that the county canvassing boards were required to submit their returns to the Department by 5 p.m. of the seventh day following the election and that the Department was not required to ignore the amended returns but rather could count

²⁰In this case, the parties conceded that the contest provisions contained in section 102.168 apply to presidential elections.

them. The court, however, erred in holding that the Secretary acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts. The Secretary's rationale for rejecting the Board's returns was as follows:

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged the possibility that the results of the manual recount could affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the possibility of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

Letter from Katherine Harris to Palm Beach Canvassing Board (Nov. 15, 2000)(emphasis added).

We conclude that, consistent with the Florida election scheme, the

Department may not reject a Board's amended returns that are filed on or before the day after the date that the overseas ballots are due. Such a rejection constitutes a clear abuse of discretion, as the Elections Canvassing Commission cannot certify the election prior to that date. Further, as set forth above, in this case involving a presidential election, the reasoned basis for the exercise of the Department's discretion to ignore amended returns after November 18, 2000 is limited to those instances where failure to ignore the amended returns will: (1) preclude a candidate, elector, taxpayer, from contesting the certification of an election pursuant to section 102.168; or (2) in the case of a federal election, result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5. In this case, as of the date that the Secretary rejected the amended returns on November 14, 2000, the deadline for receiving overseas ballots had not expired and neither of the circumstances set forth above had been considered.

Further, in this case, the Department applied its discretion in accord with a faulty premise: that an "error in vote tabulation" does not include a situation where a discrepancy between the original machine return and sample recount is due to the manner in which a ballot has been marked or punched. See Advisory Opinion DE 00-13. Accordingly, the Department did not exercise its discretion within the confines of the law. As a result of this opinion, Palm Beach County, and

potentially other counties, were thwarted in their efforts to complete the manual recount. In this Court's original opinion, we granted a remedy which, in effect, put the parties in the same position they would have been at the time the Division issued its advisory opinion on Monday, November 13, 2000.²¹ Prior to the Division's opinion, the counties had at least until Saturday, November 18 to complete the manual recounts and certify the amended results. This Court released its original opinion on Tuesday, November 21, 2000. The November 26, 2000 date gave the counties no more time to complete the recount that they would have had if the Division had not forestalled their efforts. The November 26, 2000 date was not a new "deadline" and has no effect in future elections.²² It was simply a date in accordance with the requirements that had been established prior to the election and in order to construe all the provisions of the Code as a consistent whole.

IX. CONCLUSION

²¹ At oral argument in this case, we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request manual recounts in all counties. Neither candidate requested such an opportunity.

²² We add that we did not extend the deadline for completion of the manual recounts but made clear only that the date for certification must be set within a reasonable time to allow for the election contest provisions of section 102.168. As always, it is necessary to read all provisions of the elections code in *pari materia*. In this case, that comprehensive reading required that there be time for an elections contest pursuant to section 102.168, which all parties had agreed was a necessary component of the statutory scheme and to accommodate the outside deadline set forth in 3 U.S.C. § 5 of December 12, 2000.

As is evident from the nature of the actual issue certified by the district court as one of great public importance requiring this Court's immediate attention, this Court has at all times been faced with a question of the statutory construction of Florida's election laws in accord with the intent of the Florida Legislature. Our examination of that issue has been limited to a determination of legislative intent as informed by the traditional sources and rules of construction we have long accepted as relevant in determining such intent. Not surprisingly, we have identified the right of Florida's citizens to vote and to have elections determined by the will of Florida's voters as important policy concerns of the Florida Legislature in enacting Florida's election code.

It is important, perhaps, to remind ourselves that the Florida Legislature has expressly vested in the voters of Florida the authority to elect the presidential electors who will ultimately participate in choosing a president:

Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

§ 103.011, Fla. Stat. (2000). By providing for the popular election of presidential electors, Florida's Legislature has also placed that election under Florida's general statutory election scheme. Hence, there is essentially only one statutory election scheme for all elections whether the elections be for local and state officials or for presidential electors. The Legislature has not chosen to have a separate set of election laws for elections for presidential electors. The Legislature has chosen to have a single election code control all elections. So, we must interpret and apply that single election code here.

As a consequence of having a single election code for all elections it should not be surprising to anyone to learn that these laws will be applied in most instances to elections other than those for presidential electors. For example, it is apparent that the court cases that have previously construed the election laws generally have involved state and local elections. It should not be surprising then that this Court's prior opinions that we have relied on for guidance in resolving the pending issue of statutory construction would have little reference to the Legislature's authority in the selecting of presidential electors or the Legislature's decision to grant Florida voters the right to elect presidential electors. In fact, the parties have provided us no citations to court cases in Florida involving disputes over presidential electors under Florida's election laws. This case may be the first.

In sum, Florida's statutory scheme simply makes no provision for applying its rules one way for presidential elector elections and another way for all other elections. That was a legislative decision that we have accepted. The importance of the single scheme becomes apparent when we consider the issue of the time table for filing election returns in all elections where returns must be filed according to the statutory schedule. We have construed the provisions providing for a time table as directory in light of what we perceive to be a clear legislative policy of the importance of an elector's right to vote and of having each vote counted. Hopefully, our unbroken line of cases identifying and relying on these legislative policies have not missed the mark. Further, if anything, more recent legislative changes have been crafted not only to be consistent with these policies, but also to ensure adherence to them.

Hence, based upon our perception of legislative intent, we have ruled that election returns must be accepted for filing unless it can clearly be determined that the late filing would prevent an election contest or the consideration of Florida's vote in a presidential selection. This statutory construction reflects our view that the Legislature would not wish to endanger Florida's vote not being counted in a presidential election. This ruling is not only consistent with our prior interpretation of the entire statutory election scheme, but also with our identification of the

important legislative policies underlying that scheme.

For the reasons stated in this opinion, we reverse the orders of the trial court. Based on this Court's status as the ultimate arbiter of conflicting Florida law, we conclude that our construction of the above statutes results in the formation of no new rules of state law but rather results simply in a narrow reading and clarification of those statutes, which were enacted long before the present election took place. We decline to rule more expansively in the present case, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it, the Legislature.

No motion for rehearing will be allowed.

It is so ordered.

SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
WELLS, C.J., dissents with an opinion.

WELLS, C.J., dissenting.

I dissent from issuing a new decision while the United States Supreme Court has under consideration Bush v. Gore, No. 00-949 (U.S. order filed Dec. 9, 2000), and I do not concur in the reissued opinion.

Three Cases Consolidated:

Original Proceeding - Prohibition

Denise D. Dytrych, Palm Beach County Attorney, and James C. Mize, Jr., Andrew J. McMahon and Gordon Selfridge, Assistant Palm Beach County Attorneys, West Palm Beach, Florida; Bruce Rogow and Beverly A. Pohl of Bruce S. Rogow, P.A., Fort Lauderdale, Florida; and Robert A. Butterworth, Attorney General, pro se, Paul F. Hancock and Kimberly J. Tucker, Deputy Attorneys General, George Waas and Jason Vail, Assistant Attorneys General, Tallahassee, Florida, and Cecile Luttmner Dykas, Assistant Attorney General, Fort Lauderdale, Florida,

for Petitioners

Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton, Gabriel E. Nieto, Ricardo M. Martinez-Cid, Elizabeth C. Daley, Arthur R. Lewis, Jr. and Elizabeth J. Maykut of Steel, Hector & Davis, LLP, Tallahassee, Florida, for the Elections Canvassing Commission; and Terrell C. Madigan, Harold R. Mardenborough, Jr., Christopher Barkas and Matt Butler of McFarlain, Wiley, Cassedy & Jones, P.A., Tallahassee, Florida,

for Respondents

John D.C. Newton, II of Berger Davis & Singerman, Tallahassee, Florida; Mitchell W. Berger of Berger Davis & Singerman, Fort Lauderdale, Florida; W. Dexter Douglass of the Douglass Law Firm, Tallahassee, Florida; David Boies of Boies, Schiller & Flexner, LLP, Armonk, New York; Ronald A. Klain, Democratic National Committee, Washington, DC; Lyn Utrecht and Eric Kleinfeld of Ryan, Phillips, Utrecht and MacKinnon, Washington, DC; Andrew J. Pincus, c/o Gore/Lieberman Recount Committee, Washington, DC; Laurence Tribe, Cambridge, Massachusetts; and Karen Gievers, of Karen Gievers, P.A., Tallahassee, Florida,

for Albert A. Gore and the Florida Democratic Executive Committee,
Intervenors/Petitioners

Edward A. Dion, County Attorney for Broward County, Norman M. Ostrau, Deputy County Attorney, Andrew J. Meyers, Chief Appellate Counsel, and Tamara M. Scrudgers and Jose Arrojo, Assistant County Attorneys, Fort Lauderdale, Florida; and Samuel S. Goren, James A. Cherof and Michael D. Cirullo, Jr. of Josias, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, Florida,

for The Broward County Canvassing Board and Jane Carroll, as Broward County Supervisor of Elections, Intervenor/Petitioners

Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida; Jason L. Unger of Gray, Harris & Robinson, Tallahassee, Florida; Michael A. Carvin of Cooper, Carvin & Rosenthal, PLLC, Washington, DC; Benjamin L. Ginsberg of Patton, Boggs, LLP, Washington, DC; Alex M. Azar II of Wiley, Rein & Fielding, Washington, DC; George J. Terwilliger, III, and Timothy E. Flanigan of White & Case, LLP, Washington, DC; Marcos D. Jimenez D'Clouet of White & Case, Miami, Florida; and R. Ted Cruz, Bush-Cheney Recount Committee, Austin, Texas,

for Honorable George W. Bush, Intervenor/Respondent

Thomas R. Tedcastle, General Counsel, Florida House of Representatives, Tallahassee, Florida; D. Stephen Kahn, General Counsel, The Florida Senate, Tallahassee, Florida; Roger J. Magnuson and James K. Langdon of Dorsey & Whitney LLP, Minneapolis, Minnesota; and Einer Elhauge and Charles Fried, Cambridge, Massachusetts,

for the Florida Legislature, Amici Curiae

Lois Frankel, pro se, Tallahassee, Florida,

as a member of the Florida Legislature and as minority leader of the Florida House of Representatives, Amicus Curiae

Robert G. Kerrigan of Kerrigan, Estess, Rankin & McLeod, Pensacola, Florida,

for Senator Thomas E. Rossin, a member of the Florida Legislature and the minority leader of the Florida Senate, Amicus Curiae

Case No. SC00-2348

Appeal of Judgment of Circuit Court, in and for Leon County, Terry P. Lewis,
Judge, Case No. 00-2700 - Certified by the District Court of Appeal,
First District, Case Nos. 1D00-4467/1D00-4501

John D.C. Newton, II of Berger Davis & Singerman, Tallahassee, Florida; Mitchell
W. Berger of Berger Davis & Singerman, Fort Lauderdale, Florida; W. Dexter
Douglass of the Douglass Law Firm, Tallahassee, Florida; David Boies of Boies,
Schiller & Flexner, LLP, Armonk, New York; Ronald A. Klain, Democratic
National Committee, Washington, DC; Lyn Utrecht and Eric Kleinfeld of Ryan,
Phillips, Utrecht and MacKinnon, Washington, DC; Andrew J. Pincus, c/o
Gore/Lieberman Recount Committee, Washington, DC; Laurence Tribe,
Cambridge, Massachusetts; and Karen Gievers, of Karen Gievers, P.A.,
Tallahassee, Florida; Denise D. Dytrych, Palm Beach County Attorney, and James
C. Mize, Jr., Andrew J. McMahon and Gordon Selfridge, Assistant Palm Beach
County Attorneys, West Palm Beach, Florida; Bruce Rogow and Beverly A. Pohl
of Bruce S. Rogow, P.A., Fort Lauderdale, Florida; and Robert A. Butterworth,
Attorney General, pro se, Paul F. Hancock and Kimberly J. Tucker, Deputy
Attorneys General, George Waas and Jason Vail, Assistant Attorneys General,
Tallahassee, Florida, and Cecile Luttmer Dykas, Assistant Attorney General, Fort
Lauderdale, Florida,

for Albert A. Gore and the Canvassing Board of Palm Beach County,
Florida, Appellants

Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General
Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock,
Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton,
Gabriel E. Nieto, Ricardo M. Martinez-Cid, Elizabeth C. Daley, Arthur R. Lewis,
Jr. and Elizabeth J. Maykut of Steel, Hector & Davis, LLP, Tallahassee, Florida,
for the Elections Canvassing Commission; and Terrell C. Madigan, Harold R.
Mardenborough, Jr., Christopher Barkas and Matt Butler of McFarlain, Wiley,
Cassedy & Jones, P.A., Tallahassee, Florida,

for Appellees

Edward A. Dion, County Attorney for Broward County, Norman M. Ostrau, Deputy County Attorney, Andrew J. Meyers, Chief Appellate Counsel, and Tamara M. Scrudgers and Jose Arrojo, Assistant County Attorneys, Fort Lauderdale, Florida; and Samuel S. Goren, James A. Cherof and Michael D. Cirullo, Jr. of Josias, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, Florida,

for The Broward County Canvassing Board and Jane Carroll, as Broward County Supervisor of Elections, Intervenor

Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida; Jason L. Unger of Gray, Harris & Robinson, Tallahassee, Florida; Michael A. Carvin of Cooper, Carvin & Rosenthal, PLLC, Washington, DC; Benjamin L. Ginsberg of Patton, Boggs, LLP, Washington, DC; Alex M. Azar II of Wiley, Rein & Fielding, Washington, DC; George J. Terwilliger, III, and Timothy E. Flanigan of White & Case, LLP, Washington, DC; Marcos D. Jimenez D'Clouet of White & Case, Miami, Florida; and R. Ted Cruz, Bush-Cheney Recount Committee, Austin, Texas,

for Honorable George W. Bush, Intervenor

Thomas R. Tedcastle, General Counsel, Florida House of Representatives, Tallahassee, Florida; D. Stephen Kahn, General Counsel, The Florida Senate, Tallahassee, Florida; Roger J. Magnuson and James K. Langdon of Dorsey & Whitney LLP, Minneapolis, Minnesota; and Einer Elhauge and Charles Fried, Cambridge, Massachusetts,

for the Florida Legislature, Amici Curiae

Lois Frankel, pro se, Tallahassee, Florida,

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for Senator Thomas E. Rossin, a member of the Florida Legislature and the minority leader of the Florida Senate, Amicus Curiae

Case No. SC00-2349

Appeal of Judgment of Circuit Court, in and for Leon County, Terry P. Lewis, Judge, Case No. 00-2700 - Certified by the District Court of Appeal, First District, Case Nos. 1D00-4506

John D.C. Newton, II of Berger Davis & Singerman, Tallahassee, Florida; Mitchell W. Berger of Berger Davis & Singerman, Fort Lauderdale, Florida; W. Dexter Douglass of the Douglass Law Firm, Tallahassee, Florida; David Boies of Boies, Schiller & Flexner, LLP, Armonk, New York; Ronald A. Klain, Democratic National Committee, Washington, DC; Lyn Utrecht and Eric Kleinfeld of Ryan, Phillips, Utrecht and MacKinnon, Washington, DC; Andrew J. Pincus, c/o Gore/Lieberman Recount Committee, Washington, DC; Laurence Tribe, Cambridge, Massachusetts; and Karen Gievers, of Karen Gievers, P.A., Tallahassee, Florida;

for Appellant

Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, Jr., Jonathan Sjostrom, Victoria L. Weber, John W. Little, III, Donna E. Blanton, Gabriel E. Nieto, Ricardo M. Martinez-Cid, Elizabeth C. Daley, Arthur R. Lewis, Jr. and Elizabeth J. Maykut of Steel, Hector & Davis, LLP, Tallahassee, Florida, for the Elections Canvassing Commission; and Terrell C. Madigan, Harold R. Mardenborough, Jr., Christopher Barkas and Matt Butler of McFarlain, Wiley, Cassedy & Jones, P.A., Tallahassee, Florida,

for Appellees

Edward A. Dion, County Attorney for Broward County, Norman M. Ostrau,

Deputy County Attorney, Andrew J. Meyers, Chief Appellate Counsel, and Tamara M. Scrudgers and Jose Arrojo, Assistant County Attorneys, Fort Lauderdale, Florida; and Samuel S. Goren, James A. Cherof and Michael D. Cirullo, Jr. of Josias, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, Florida,

for The Broward County Canvassing Board and Jane Carroll, as Broward County Supervisor of Elections, Intervenors

Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida; Jason L. Unger of Gray, Harris & Robinson, Tallahassee, Florida; Michael A. Carvin of Cooper, Carvin & Rosenthal, PLLC, Washington, DC; Benjamin L. Ginsberg of Patton, Boggs, LLP, Washington, DC; Alex M. Azar II of Wiley, Rein & Fielding, Washington, DC; George J. Terwilliger, III, and Timothy E. Flanigan of White & Case, LLP, Washington, DC; Marcos D. Jimenez D'Clouet of White & Case, Miami, Florida; and R. Ted Cruz, Bush-Cheney Recount Committee, Austin, Texas,

for Honorable George W. Bush, Intervenor

Thomas R. Tedcastle, General Counsel, Florida House of Representatives, Tallahassee, Florida; D. Stephen Kahn, General Counsel, The Florida Senate, Tallahassee, Florida; Roger J. Magnuson and James K. Langdon of Dorsey & Whitney LLP, Minneapolis, Minnesota; and Einer Elhauge and Charles Fried, Cambridge, Massachusetts,

for the Florida Legislature, Amici Curiae

Lois Frankel, pro se, Tallahassee, Florida,

as a member of the Florida Legislature and as minority leader of the Florida House of Representatives, Amicus Curiae

Robert G. Kerrigan of Kerrigan, Estess, Rankin & McLeod, Pensacola, Florida,

for Senator Thomas E. Rossin, a member of the Florida Legislature and the minority leader of the Florida Senate, Amicus Curiae

December 12, 2000

Affirmation of Seminole County Absentee Ballot Ruling

Supreme Court of Florida

No. SC00-2447

HARRY N. JACOBS, etc., et al.,
Appellants,

vs.

SEMINOLE COUNTY CANVASSING BOARD, etc., et al.,
Appellees.

[December 12, 2000]

PER CURIAM.

We have for review a trial court order appealed to the First District Court of Appeal, which certified the order to be of great public importance and to require immediate resolution by this Court. We have jurisdiction pursuant to article V, section 3(b)(5) of the Florida Constitution. For the reasons expressed below, we affirm.

Appellants filed suit against the Seminole County Canvassing Board and others pursuant to section 102.168, Florida Statutes (2000), to contest the 2000

election. A bench trial was held in this case on December 6 and 7, 2000. The appellants alleged there were thousands of requests for absentee ballots in Seminole County that should be invalidated because the requests were not made in strict compliance with the absentee ballot laws. Specifically appellants claimed the Seminole County Supervisor of Elections illegally treated Republican Party representatives differently from other political party representatives by allowing them access to her office for the purpose of adding voter identification numbers to requests that did not contain that information. Based on the complaint, answers, admissions, stipulations, and the evidence adduced at trial the followings facts were determined.

Prior to the November 7, 2000, general election both the Republican and Democratic Parties prepared and mailed to registered voters for their respective parties preprinted requests for absentee ballots. The parties agreed that this practice is not prohibited by law. The request form prepared by the Democratic Party had a space provided for the voter identification number or the voter identification number was preprinted on the request form. In contrast, the request form prepared by the Republican Party did not include either a space for the voter identification number or the preprinted number. In addition there was no instruction on the Republican form informing the voter to include the voter

identification number.

Generally, when absentee ballot request forms are returned, the Supervisor's office mails out the absentee ballots with instructions. In this instance, thousands of request forms without voter identification numbers were returned to the Supervisor's office. Thereafter, Republican Party representatives, who were not employed in the Supervisor's office, used the Supervisor's office and equipment to add voter identification numbers to request forms. Once the voter identification numbers were added, the Supervisor accepted the requests and sent absentee ballots to the persons named on the request forms.

In its comprehensive order, the trial court denied relief, stating in relevant part:

The first issue for this court to decide is whether the absentee voting laws require strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballots. Did the addition of voter registration identification numbers on the request forms after they were submitted to the Supervisor constitute such an irregularity that the ballots cast thereafter should be invalidated, or did the addition of that information constitute a violation of the absentee voter election laws that did not impugn or compromise the integrity of the ballots cast or ultimately the election itself?

Section 101.62, Florida Statutes, provides that the supervisor of elections may accept a request for absentee ballots from an elector and that the person making the request must disclose:

1. The name of the elector for whom the ballot is requested;
2. The elector's address;
3. The last four digits of the elector's social security number;
4. The registration number on the elector's registration identification card;
5. The requester's name;
6. The requester's address;
7. The requester's social security number and, if available, driver's license number;
8. The requester's relationship to the elector; and
9. The requester's signature (written requests only).

(emphasis supplied).

Although the statute clearly sets forth what must be disclosed by the person requesting the absentee ballot, there is no statutory directive regarding the treatment of absentee ballot requests which do not contain all of the information required by Section 101.62(1)(b), Florida Statutes. In contrast, there is a clear statutory directive regarding the treatment of absentee ballots which do not contain all of the information required on the ballot. Section 101.68(2), Florida Statutes specifically provides that a ballot that fails to include the statutory elements is illegal. . . .

[In McLean v. Bellamy, 437 So. 2d 737, 742-743 (Fla. 1st DCA 1983), the court stated:

Our examination of Section 101.62 leads us to conclude that its provisions are directory. We are unable to glean from the provision of that section a legislative intent that the failure to follow the letter of its provisions should result in the invalidation of absentee ballots cast by qualified electors who are

also qualified to vote absentee.]]¹

[A]fter rampant absentee voter fraud occurred in the Miami mayoral election, the Miami Beach City Commission election and the Hialeah mayoral election, the Florida Legislature amended and detailed absentee voter laws to include the requirements now found in Section 101.62, Florida Statutes Unless a statutory provision also specifically states that the lack of information voids the ballot, the lack of the information does not automatically void the ballot. See, Final Bill Research & Economic Impact Statement, House of Representatives Committee on election Reform, CS/HB Sections 3743, 3941 at page 8 (passed as CS/HB 1402) on May 12, 1998.

Because the irregularities in the casting of the actual ballot are directory unless specified in a statute as mandatory, it follows that the information listed as necessary for a request for an absentee ballot is directory, and not mandatory. It cannot be said that the lack of a voter registration identification number on an absentee ballot request is calculated to effect the integrity of the request itself or the subsequent ballot or the election, when substantial other identifying information has been included on the request. In comparison, Section 102.68(2)(c), Florida Statutes requires that a voters name, address and signature must be included on an absentee ballot. That section goes on to provide specifically that the failure to include the absentee voter's name address and signature voids the ballot.

There is no invalidating directive for failure to include the voter registration identification number on a request for an absentee ballot. . . .

The statutory requirement that the requester "must"

¹ The language in the brackets was included in another portion of the trial court's order.

disclose the nine items in Section 101.62(b) is simply not a definitive statement by the Legislature that requests which are missing the voter's registration number are illegal or void. In contrast, Section 101.68(2)(c)1., Florida Statutes provides that an absentee ballot shall be considered illegal if it does not include the signature and the last four digits of the social security number of the elector, as shown by the registration records, and either the subscription of a notary [or] the signature, printed name, address, voter identification number, and county of registration of one attesting witness, who is a registered voter in the state.

. . . .

The second issue for the court's determination is whether the Supervisor of Elections treated the representatives of the Florida Republican Party differently than she treated representatives of other political parties to the extent that the integrity of the ballots or election was compromised. The plaintiffs allege that the Supervisor of Elections "treated the interests of non-Republican voters differently from those of Republican voters" because she informed the public that she would strictly enforce the requirements of Section 101.62, Florida Statutes, including the disclosure of the voter identification number, yet she honored the request of a Republican representative to obtain access to the incomplete request forms and add the voter identification numbers and did not notify the Democratic Party or any other group of this development. The plaintiffs argued at trial that this failure to notify others and invite others to take the same actions constituted illegal disparate treatment. However, the proof offered at trial failed to show that she treated other political parties differently than she treated the Republican party. . . . Unlike the Republican mail-out, the Democratic mail-out did not suffer from the general omission of the voter identification numbers. Therefore, there was no need for the

Democrats to request access to the request forms to correct them, and in fact, there was no evidence that such a request was made by the Democratic party or any other political subdivision. Consequently, there was no evidence that the request of any representative, including any Democrat, was denied by the Supervisor. Thus, there was no adequate showing that there was disparate treatment of Republicans as opposed to any other individuals or groups with regard to the ballot request forms.

There was no allegation or evidence that any of the absentee votes counted were not "cast by qualified, registered voters who were entitled to vote absentee and who did so in a proper manner." Boardman v. Esteve, 323 So. 2d 259 at 269 (Fla. 1975). The effect the irregularities complained of could have had on the election was the prevention of voting by certain requesters for absentee ballots whose requests lacked the voter identification number and who were unwilling or unable to go to their precinct to cast their vote on election day. There was no evidence that any absentee ballot requests were excluded or denied solely because they lacked the required voter registration identification number.

. . . The evidence presented in this case does not support a finding of fraud, gross negligence, or intentional wrongdoing in connection with any absentee ballots. . . . That the Supervisor's judgement may be seriously questioned, and that her actions invited public and legal scrutiny, do not rise to the level of a showing of fraud, gross negligence, or intentional wrongdoing.

Jacobs v. The Seminole County Canvassing Board, No. 00-2816, 2000 WL 1793429 at *3-5 (Fla. 2d Cir. Ct. Dec. 8, 2000).

We find competent, substantial evidence to support the trial court's

conclusion that the evidence in this case does not support a finding of fraud, gross negligence, or intentional wrongdoing in connection with any absentee ballots. The record in this case is clear that the application forms in question contained the name, address, signature, and the last four digits of the social security number of the applicant. This information was sufficient to establish the qualifications of the applicant.² It was also stipulated by the parties that the application forms had already been signed by the applicant when the third parties corrected the omissions on the forms. Hence, we conclude that the trial court reached a proper conclusion guided by our prior case law.

We especially note, however, that at the conclusion of its order, the trial court found that the Supervisor of Elections of Seminole County exercised faulty judgment in first rejecting completely the requests in question, and compounded the problem by allowing third parties to correct the omissions on the forms. Nothing can be more essential than for a supervisor of elections to maintain strict compliance with the statutes in order to ensure credibility in the outcome of the

² While there may be questions regarding the application forms in this case, there is no question that the ballots themselves conformed to the requirements of section 101.68, Florida Statutes (2000), which requires the signature and the last four digits of the social security number of the elector, and either subscription of a notary or identifying information from the attesting witness.

election.³ We find the Supervisor's conduct in this case troubling and we stress that our opinion in this case

is not to be read as condoning anything less than strict adherence by election officials to the statutorily mandated election procedures. Such adherence is vital to safeguarding our representative form of government, which directly depends upon election officials' faithful performance of their duties. . . . [T]his case [does not] concern[] potential sanctions for election officials who fail to faithfully perform their duties. It is for the legislature to specify what sanction should be available for enforcement against election officials who fail to faithfully perform their duties.

Beckstrom v. Volusia County Canvassing Board, 707 So. 2d 720, 725-26 (Fla. 1998).

Accordingly, we affirm the portions of the trial court's order that are set forth above and adopt them as our own. We also affirm the trial court's conclusion that appellant is entitled to no relief.

It is so ordered.

WELLS, C.J., and HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
SHAW, J., recused.

NO MOTION FOR REHEARING WILL BE ALLOWED.

³ We note that chapter 104 of the Florida Election Code provides certain penalties for election officials and others who violate the Code. However, violations of the Code will not necessarily invalidate the votes of innocent electors.

Appeal of Judgment of Circuit Court, in and for Leon County, Nikki Ann Clark, Judge,
Case No. 00-2816 - Certified by the District Court of Appeal,
First District, Case No. 1D00-4832

Gerald F. Richman, Alan G. Greer and John R. Whittles of Richman, Greer, Weil, Brumbaugh, Mirabito & Christensen, P.A., West Palm Beach, Florida; Scott E. Perwin and Pamela I. Perry, Miami, Florida; Kent Spriggs of Spriggs & Davis, Tallahassee, Florida; Robert D. Lenhard, Washington, D.C.; John R. Cuti, Jonathan S. Abady and Llann M. Maazel of Emery, Cuti, Brinckerhoff & Abady PC, New York, New York; and Eric Seiler and Katherine L. Pringle of Friedman, Kaplan, Seiler & Adelman LLP, New York, New York,

for Appellants

Terry C. Young and Janet M. Courtney of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, Florida, for Seminole County Canvassing Board, Sandra Goard, Kenneth McIntosh and John Sloop; Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida, Benjamin L. Ginsberg of Patton Boggs LLP, Washington, D.C., B. Daryl Bristow and Amy Douthitt Maddux of Baker Botts LLP, Houston, Texas, and Stuart Levey of Miller, Cassidy, Larroca & Lewin LLP, Washington, D.C., for George W. Bush and Dick Cheney; Kenneth W. Wright of Shutts & Bowen, LLP, Orlando, Florida, for Republican Party of Florida; and Deborah K. Kearney, General Counsel, and Kerey M. Carpenter, Assistant General Counsel, Tallahassee, Florida, and Jonathan Sjostrom, Victoria L. Weber, Donna E. Blanton and Elizabeth C. Daley of Steel, Hector & Davis LLP, Tallahassee, Florida, for Katherine Harris, as Florida Secretary of State, and Katherine Harris, L. Clayton Roberts, and Bob Crawford, as members of the Florida Elections Canvassing Commission,

Appellees

Mathew D. Staver, Erik W. Stanley, Joel L. Oster, Dean F. DiBartolomeo, Marvin Rooks, John Stemberger, Mike Gotschall, and Sharon Blakeney, Liberty Counsel, Longwood, Florida,

for Tim Brock, et al., Intervenors

December 12, 2000

Affirmation of Martin County Absentee Ballot Ruling

Supreme Court of Florida

No. SC00-2448

RONALD TAYLOR, etc., et al.,
Appellants,

vs.

MARTIN COUNTY CANVASSING BOARD, etc., et al.,
Appellants.

[December 12, 2000]

PER CURIAM.

We have for review a trial court order appealed to the First District Court of Appeal, which certified the order to be of great public importance and to require immediate resolution by this Court. We have jurisdiction pursuant to article V, section 3(b)(5) of the Florida Constitution.

This case involves an election contest of the November 7, 2000, presidential election results pursuant to section 102.168, Florida Statutes (2000). The plaintiffs, electors in Martin County, sought to invalidate all or a portion of the absentee

ballots cast in Martin County on the basis that there were irregularities relative to the requests for the absentee ballots.

The following facts were established during the non-jury trial on the electors' complaints. Both the Republican and Democratic Parties of Florida disseminated pre-printed absentee ballot request forms to registered voters in Martin County prior to the election. The Martin County Supervisor of Elections received a number of Republican request forms which had missing or incorrect voter identification numbers on them. There was no similar problem with the Democratic request forms received. The Supervisor's office followed a policy of not issuing absentee ballots where the elector's voter registration number was missing or incorrect on the request form. Further, it was office policy not to fill in any missing information or make any corrections or alterations to the request form without the express authority of the elector. Despite this policy and despite the requirements of section 101.62, Florida Statutes (2000),¹ the Supervisor of Elections allowed

¹ Section 101.62, Florida Statutes (2000), governs requests for absentee ballots. This statute provides that the supervisor of elections may only accept a request for an absentee ballot from "the elector, or, if directly instructed by the elector, a member of the elector's immediate family, or the elector's legal guardian." Id. § 101.062(1)(b). Further, the person making a request for an absentee ballot must disclose the following information: the name of the elector for whom the ballot is requested; the elector's address; the last four digits of the elector's social security number; the elector's voter registration number; the requester's name, address, social security number and, if available, driver's license number, and relationship to the elector, and the requester's

representatives of the Florida Republican Party to remove several hundred request forms from her office in order to add missing voter identification numbers. After making these changes, the Republican Party officials returned the request forms to the Supervisor's office. The Supervisor then processed the corrected request forms and sent absentee ballots to the voters. See Taylor v. Martin County Canvassing Bd., No. CV 00-2850, 2000 WL 1793409, at *1 (Fla. 2d Cir. Ct. Dec. 8, 2000).

In their complaint, the plaintiffs asserted that this procedure in Martin County violated various Florida laws, created an opportunity for fraud, tainted the integrity and fairness of the election, and cast doubt on the validity of the results. The plaintiffs asked the trial court to invalidate the ballots issued under this procedure.

Following the non-jury trial in this case, the trial court concluded that the procedure was contrary to Florida law, offered an opportunity for fraud, and created the appearance of partisan favoritism on the part of the Supervisor of Elections. See id. at *2. However, the court found no evidence of "fraud nor other intentional misconduct." Id. The court further concluded that "despite these irregularities [relative to the requests for absentee ballots] . . . the sanctity of the ballot and the integrity of the election were not affected" and that "[t]he election in

signature, if a written request. See id.

Martin County was a full and fair expression of the will of the people.” Id. at *4.

Based upon these conclusions, the trial court found that the plaintiffs were not entitled to relief. Id.

In Jacobs v. Seminole County Canvassing Board, No. SC00-2447 (Fla. Dec. 12, 2000), we were faced with almost identical circumstances regarding absentee ballot requests. While the circuit court found similar irregularities surrounding absentee ballot requests in that case, it also found no evidence of fraud or misconduct. See Jacobs v. Seminole County Canvassing Bd., No. 00-2816, 2000 WL 1793429, at *4 (Fla. 2d Cir. Ct. Dec. 8, 2000).

We conclude that our decision in Jacobs controls the outcome in the instant case. Accordingly, we affirm the result below based upon the reasoning we expressed in Jacobs.

It is so ordered.

WELLS, C.J., and HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
SHAW, J., recused.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Appeal of Judgment of Circuit Court, in and for Leon County, Terry P. Lewis, Judge, Case No. CV00-2850 - Certified by the District Court of Appeal, First District, Case No. 1D00-4829

Robert Augustus Harper, Steven Brian Whittington, and Jason Michael Savitz of

Robert Augustus Harper Law Firm, P.A., Tallahassee, Florida; Edward S. Stafman of Edward S. Stafman, P.A., Tallahassee, Florida; Robert L. King and Michael B. Marker of Carr, Korein, Tillery, Kunin, Montroy, Cates, Katz & Glass, L.L.C, St. Louis, Missouri; John T. Kennedy, Stuart, Florida; and Gary M. Farmer of Gillespie, Goldman, Kronengold & Farmer, Fort Lauderdale, Florida,

for Appellants

Ronald A. Labasky of Skelding, Labasky & Cox, Tallahassee, Florida, for the Martin County Canvassing Board, Robbins, Hershey and Wilcox; Barry Richard of Greenberg, Traurig, P.A., Tallahassee, Florida, Benjamin L. Ginsberg of Patton Boggs LLP, Washington, D.C., B. Daryl Bristow and Amy Douthitt Maddux of Baker Botts LLP, Houston, Texas, and Stuart Levey of Miller, Cassidy, Larroca & Lewin LLP, Washington, D.C., for George W. Bush and Dick Cheney; Kenneth W. Wright of Shutts & Bowen LLP, Orlando, Florida, for Republican Party of Florida; and Deborah K. Kearney, General Counsel, and Kerey M. Carpenter, Assistant General Counsel, Tallahassee, Florida, Jonathan Sjostrom, Victoria L. Weber, Donna E. Blanton, and Elizabeth C. Daley of Steel, Hector & Davis LLP, Tallahassee, Florida, for Katherine Harris, L. Clayton Roberts, and Bob Crawford, as members of the Florida Elections Canvassing Commission,

Appellees

W. Robert Vezina, III, Tallahassee, Florida,

for John E. Thrasher, Intervenor

Mathew D. Staver, Erik W. Stanley, Joel L. Oster, Dean F. DiBartolomeo, Marvin Rooks, John Stemberger, Mike Gotschall and Sharon Blakeney, Liberty Counsel, Longwood, Florida,

for Richard J. Kosmoski, et al., Intervenor

December 12, 2000

Order of U.S. Supreme Court on Remand of Bush v. Gore

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
470-3011

December 12, 2000

FILED
THOMAS D. HALL

DEC 12 2000

CLERK, SUPREME COURT
BY _____

Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32399

Re: George W. Bush and Richard Cheney
v. Albert Gore, Jr., et al.
No. 00-949 (Your docket No. SC00-2431)

Dear Clerk:

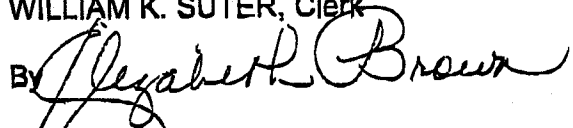
Pursuant to Rule 45.2 of the Rules of this Court, enclosed are a certified copy of the mandate and a copy of the opinion of this Court in the above-entitled case.

Kindly acknowledge receipt on the attached copy of this letter.

Sincerely,

WILLIAM K. SUTER, Clerk

By


Elizabeth Brown
Judgments/Mandates Clerk

Enc.

cc: All counsel of record

Supreme Court of the United States

FILED
THOMAS D. HALL

DEC 12 2000

No. 00-949

CLERK, SUPREME COURT
BY _____

GEORGE W. BUSH and RICHARD CHENEY,

Petitioners

v.

ALBERT GORE, JR., ET AL.

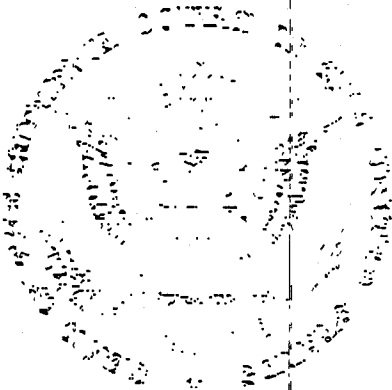
ON WRIT OF CERTIORARI to the Supreme Court of Florida.

THIS CAUSE having been submitted on the transcript of the record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is reversed, and the case is remanded to the Supreme Court of Florida for further proceedings not inconsistent with the opinion of this Court.

PURSUANT TO RULE 45.2, the Clerk is directed to issue the mandate forthwith.

December 12, 2000



A true copy William K. Sullivan

Test:

Clerk of the Supreme Court of the United States

By

Marcus J. Colan

Chief Deputy

United States of America, ss:

FILED
THOMAS D. HALL

DEC 12 2000

THE PRESIDENT OF THE UNITED STATES OF AMERICA

CLERK, SUPREME COURT
BY _____

To the Honorable the Justices
of the Supreme Court
of Florida

GREETINGS:

WHEREAS, lately in the Supreme Court of Florida, there came before you a cause between Albert Gore, Jr., and Joseph I. Lieberman, Appellants, and Katherine Harris, as Secretary, etc., et al., Appellees, No. SC00-2431, wherein the judgment of the said Supreme Court was duly entered on the 8th day of December, 2000, as appears by an inspection of the record.

AND WHEREAS, in the October 2000 Term, the said cause having been submitted to the **SUPREME COURT OF THE UNITED STATES** on the transcript of the record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged on December 12, 2000, by this Court that the judgment of the above court in this cause is reversed, and the case is remanded to the Supreme Court of Florida for further proceedings not inconsistent with the opinion of this Court.

Witness the Honorable WILLIAM H. REHNQUIST, Chief Justice of the United States, the 12th day of December, in the year Two Thousand.

William K. Suter

Clerk of the Supreme Court
of the United States

No. 00-949

George W. Bush and Richard Cheney

v.

Albert Gore, Jr., et al.



A true copy WILLIAM K. SUTER

Test:

Clerk of the Supreme Court of the United States

By

Thomas J. Carter

Chief Deputy

December 14, 2000

Order on Remanded Case of Gore v. Harris, following U.S. Supreme Court decision.

Supreme Court of Florida

THURSDAY, DECEMBER 14, 2000

**ALBERT GORE, JR., ET AL. vs. KATHERINE HARRIS, ETC.,
ET AL.**

Case No. SC00-2431

DCA Case No. 1D00-4745
Circuit Court Case No. 00-2808

Appellants

Appellees

ORDER ON REMAND

This case is before the Court on remand from the United States Supreme Court. See Bush v. Gore, No. 00-949 (U.S. Dec. 12, 2000). The per curiam opinion of the Supreme Court majority specified that in order for a manual recount to continue:

It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required,

perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. § 101.015 (2000).

Id., slip op. at 11-12. The Supreme Court majority ultimately concluded that:

Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Id., slip op. at 12.

On the date of the subject election, the Florida Election Code did not provide the elements necessary for a resolution of the disputed issues, based on the constitutional parameters expressed by the United States Supreme Court. Accordingly, relief cannot be granted, and this case is dismissed. Opinion may follow.

No motion for rehearing will be allowed.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy

TEST:

A handwritten signature in black ink that reads "Thomas D. Hall". The signature is written in a cursive, flowing style.

Thomas D. Hall
Clerk, Supreme Court

tc

Served:

MITCHELL W. BERGER
JOHN D.C. NEWTON, II
DAVID BOIES
W. DEXTER DOUGLASS
JOHN J. CORRIGAN
RONALD A. KLAIN
DENNIS NEWMAN
ANDREW J. PINCUS
JEFFREY D. ROBINSON
JOSEPH SANDLER
THERESA WYNN ROSEBOROUGH
KENDALL COFFEY
MARK R. STEINBERG
BENEDICT P. KUEHNE
DEBORAH K. KEARNEY
KEREY CARPENTER
ALVIN LINDSAY, III
JOSEPH P. KLOCK, JR.
JOHN W. LITTLE, III
ROBERT W. PITTMAN
GABRIEL E. NIETO
WALTER J. HARVEY
RICARDO MARTINEZ-CID
BARRY RICHARD
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GEORGE J. TERWILLIGER, III
TIMOTHY E. FLANIGAN
KIRK VAN TINE
MURRAY A. GREENBERG
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THOMAS A. TUCKER RONZETTI
JEFFREY PAUL EHRLICH
LEONARD W. BERGER

ANDREW J. MCMAHON
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MICHAEL S. MULLIN
GARY L. PRINTY
W. ROBERT VEZINA, III
FREDERICK J. SPRINGER
TERRELL C. MADIGAN
HAROLD R. MARDENBOROUGH, JR.
CHRISTOPHER BARKAS
WILLIAM KEMPER JENNINGS
HAROLD MCLEAN
LARRY KLAYMAN
G. IRVIN TERRELL
DARYL B. BRISTOW
R. FRANK MYERS
JASON L. UNGER
GARY R. RUTLEDGE
CRAIG A. MEYER
HON. DAVE LANG, CLERK
HON. N. SANDERS SAULS, JUDGE
HON. JON S. WHEELER, CLERK

December 22, 2000

**Opinion of Florida Supreme Court in Gore. v. Harris, following U.S.
Supreme Court remand.**

Supreme Court of Florida

No. SC00-2431

ALBERT GORE, JR., and JOSEPH I. LIEBERMAN,
Appellants,

vs.

KATHERINE HARRIS, as Secretary, etc., et al.,
Appellees.

[December 22, 2000]

PER CURIAM.

This case is before the Court on remand from the United States Supreme Court. See Bush v. Gore, No. 00-949 (U.S. Dec. 12, 2000).¹ In our previous opinion, we ordered the Circuit Court of Leon County to tabulate by hand 9000 contested Dade County ballots. See Gore v. Harris, 25 Fla. L. Weekly S1112, S1117 (Fla. Dec. 8, 2000). This Court further held that relief would require manual recounts in all Florida counties where undervotes existed which had not

¹This opinion follows our dismissal of this cause by order of December 14, 2000.

previously been subject to manual tabulation. See id. at S1114, S1117-18. The standard we directed be employed in the manual recount was the standard established by the Legislature in the Florida Election Code, i.e., that a vote shall be counted as a "legal" vote if there is a "clear indication of the intent of the voter." See id. at S1118 (citing section 101.5614(5), Florida Statutes (2000)). The "intent of the voter" standard adopted by the Legislature was the standard in place as of November 7, 2000, and a more expansive ruling would have raised an issue as to whether this Court would be substantially rewriting the Code after the election, in violation of article II, section 1, clause 2 of the United States Constitution and 3 U.S.C. § 5 (1994).

The per curiam opinion of the Supreme Court held that the Florida statutory standard for the manual examination of ballots violates equal protection rights. See Bush, slip op. at 7. Although the Supreme Court found the legislatively prescribed standard to be unobjectionable as an abstract proposition and starting principle, it noted "[t]he problem inheres in the absence of specific standards to ensure its equal application." Id. The Supreme Court specified that in order for a manual recount to continue:

It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable

procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. 101.015 (2000).

Id., slip op. at 11-12. The Supreme Court ultimately mandated that any manual recount be concluded by December 12, 2000, as provided in 3 U.S.C. 5. See id., slip op. at 12. In light of the time of the release of the Supreme Court opinion, these tasks and this deadline could not possibly be met. Moreover, upon reflection, we conclude that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature.

Accordingly, pursuant to the direction of the United States Supreme Court, we hold appellants can be afforded no relief.

It is so ordered.

SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
WELLS, C.J., concurs in result only with an opinion.

SHAW, J., concurs with an opinion.
HARDING, J., concurs in result only.
PARIENTE, J., concurs with an opinion.

NO MOTION FOR REHEARING WILL BE ALLOWED.

WELLS, C.J., concurring in result only.

I concur only in the result which this Court decided in its order on remand in this case, which was that no relief could be granted and the case be dismissed.

SHAW, J., concurring.

This case has torn the nation and the judiciary. It is quintessentially divisive and confounding. The problem, I believe, lies not in the partisan nature of the issues but rather in the deeply rooted, and conflicting, legal principles that are involved.

A. The General Welfare

A fundamental principle underlying all legal proceedings is the search for the truth. Once the truth is uncovered, we assume that a remedy can be fashioned. The present case posed a simple question: Who won the presidential election in Florida? The answer, in the eyes of many, also was simple: The truth lies in the vaults and storage rooms throughout the state where the untabulated ballots of

thousands of Floridians are sequestered.

A second deeply rooted principle is the right of suffrage. The right to vote, and to have each vote counted, is a preeminent civil right² and has been won at great cost. It was not too far in our nation's past that throngs of citizens marched in the streets to protest the suppression of this right and risked being beaten with nightsticks and set upon with tear gas, fire-hoses, and dogs. Some were jailed. A few men, women, and children were killed. The suppression of this right is now anathema to the nation. The right to vote, and to have each vote counted, goes to the very heart of this case.³

Both the search for the truth and the right to vote are of paramount importance, but they are circumscribed by a higher, overarching concern the general welfare of our democracy. The general welfare is informed by our law.⁴

²See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[The right of suffrage] is regarded as a fundamental political right, because preservative of all rights.TM).

³See generally Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.TM).

⁴The concern for the general welfare of our democracy is implicit in the United States Constitution, which provides in part:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and

The law infuses the fabric of our society and breathes life into all our legal principles. Inherent in the law are the basic concepts of fairness, reliability, and predictability; and the constitutional safeguards of due process and equal protection were designed to promote these interests. Although the pursuit of the truth and the preservation of the right to vote are worthy goals, they cannot be achieved in a manner that contravenes these principles.

B. The Recount Dilemma

A unanimous Florida Supreme Court in Palm Beach County Canvassing Board v. Harris, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000), applied traditional rules of statutory construction to resolve several conflicts and ambiguities in the Florida Election Code (~ Code™. The Court concluded that countywide manual recounts had been improperly cut off in the ~ protest™ phase⁵ by an advisory statement issued by the Florida Secretary of State, and we ordered that the counties must be given a commensurate window of opportunity in which to complete the manual recounts and submit supplemental returns. The United States

establish this Constitution for the United States of America.

U.S. Const. pmb1.

⁵See 102.166, Fla. Stat. (2000).

Supreme Court vacated the judgment,⁶ but this Court on remand reaffirmed our prior holding.⁷

In Gore v. Harris, 25 Fla. L. Weekly S1112 (Fla. Dec. 8, 2000), a majority of the Florida Supreme Court authorized a manual recount of untabulated ballots in the ~contest™ phase.⁸ To comport with due process and equal protection concerns, the Court ordered that the recount be conducted statewide and that the results be adjudicated by a single judge. I dissented because I felt that the recount, as formulated, lacked sufficient guidelines and could not be completed promptly and fairly. The United States Supreme Court on the first day of the recount, i.e., December 9, stayed the recount and at 10 p.m., December 12, ruled that additional guidelines were required. The Court further held that December 12 was a mandatory deadline under the Florida Election Code and that any recount extending beyond that date was violative of Florida law, thus foreclosing the possibility of a recount.⁹

⁶See Bush v. Palm Beach County Canvassing Bd., 69 U.S.L.W. 4020 (Dec. 4, 2000).

⁷See Palm Beach County Canvassing Bd. v. Harris, 25 Fla. L. Weekly S1126 (Fla. Dec. 11, 2000).

⁸See § 102.168, Fla. Stat. (2000).

⁹The United States Supreme Court ruled as follows:

Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we

First, in my opinion, December 12 was not a “drop-dead” date under Florida law. In fact, I question whether any date prior to January 6 is a drop-dead date under the Florida election scheme.¹⁰ December 12 was simply a permissive

reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

. . . Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice Breyer’s proposed remedy of remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18 contemplates action in violation of the Florida election code, and hence could not be part of an “appropriate” order authorized by Fla. Stat. § 102.168(8) (2000).

Bush v. Gore, No. 00-949, slip op. at 12 (U.S. Dec. 12, 2000).

¹⁰Title III, section 15, United States Code, provides that regardless of prior dates, Florida is entitled to deliver its electoral votes to Congress prior to January 6 at which time Congress must count those votes unless Congress determines that the votes “have [not] been regularly given”:

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o’clock in the afternoon on that day [A]nd the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States [N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected If more than one return of paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed . . . but in case there shall arise the question which of two or more of such State authorities determining what electors have been

~safe-harbor™ date to which the states could aspire.¹¹ It certainly was not a mandatory contest deadline under the plain language of the Florida Election Code

appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.

3 U.S.C. § 15 (emphasis added).

¹¹Title III, section 5, United States Code, provides that where a dispute concerning the appointment of electors is settled at least six days prior to the date set for the meeting of electors (i.e., at least six days prior to December 18, 2000), the state's decision concerning the settlement is conclusive:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such state, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (emphasis added).

(i.e., it is not mentioned there) or this Court's prior rulings.¹² Second, regardless of the safe-harbor date, I am not convinced that additional safeguards could have been formulated that would have satisfied the United States Supreme Court.

Given the tenor of the opinion in Bush v. Gore, No. 00-949 (U.S. Dec. 12, 2000), I do not believe that the Florida Supreme Court could have crafted a remedy under these circumstances that would have met the due process, equal protection, and other concerns of the United States Supreme Court.¹³

¹²Contrary to the ruling of the United States Supreme Court in Bush v. Gore, No. 00-949 (U.S. Dec. 12, 2000), our prior opinions discussed Title III vis-a-vis the Florida Secretary of State's authority to reject late returns arising from a pre-certification protest action, not vis-a-vis a court's obligation to stop a recount in a post-certification contest action. See Palm Beach County Canvassing Bd. v. Harris, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000), and Palm Beach County Canvassing Bd. v. Harris, 25 Fla. L. Weekly S1126 (Fla. Dec. 11, 2000). To mix these two actions is to confuse apples and oranges.

¹³The United States Supreme Court summarized the constitutional requirements for a recount:

[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise.

Bush v. Gore, No. 00-949, slip op. at 11 (U.S. Dec. 12, 2000). The Court then adopted the position of the Florida Secretary of State concerning untabulated ballots:

In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary.

C. Human Failings

Admittedly, the present scenario is surreal: All the king-s-horses and all the king-s-men could not get a few thousand ballots counted. The explanation, however, is timeless. We are a nation of men and women and, although we aspire to lofty principles, our methods at times are imperfect.

First, although the untabulated Florida ballots may hold the truth to the presidential election, we still› to this day› cannot agree on how to count those ballots fairly and accurately. In fact, we cannot even agree on if they should be counted. Second, although the right to vote is paramount, we routinely installed outdated and defective voting systems and tabulating equipment at our polls prior to the present election. And finally, although the rule of law is supreme, the key legal text in this case› i.e., the Florida Election Code› is fraught with contradictions and ambiguities, and the key legal ruling› i.e., the United States Supreme Court-s-final decision in Bush v. Gore, No. 00-949 (U.S. Dec. 12, 2000)› was denigrated and rejected by nearly half the members of that Court.

Bush, slip op. at 11-12. And finally, the Court construed Florida law to give the Secretary a decisive evaluative role:

Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by Fla. Stat. 101.015 (2000).

Bush, slip op. at 12.

D. Conclusion

I commend the public officials, employees, and volunteers of this state› each election supervisor, judge, court clerk, board member, and all the others› who worked tirelessly in a star-crossed effort to count every vote. I commend the people of our state and nation who looked faithfully to the courts to interpret and apply the law. I also commend Vice President Gore for persevering in the labor of Sisyphus; each time he attempted to comply with the Code, he was forced to begin anew. And I commend President-elect Bush for remaining stalwart in the face of charges of suppressing the truth (i.e., of obstructing the counting of ballots) and disenfranchising the voters of this state. And finally, I especially commend the other justices of this Court, each of whom approached this case with a sworn resolve to be objective, honorable, and fair.

Our nation has been through an ordeal, but we have learned from the experience. At this point, I know one thing for certain: The basic principles of our democracy are intact.

PARIENTE, J., concurring.

I concur fully with the majority opinion. However, I write separately to discuss several concerns with Florida's present Election Code and the use of

different voting systems in place in Florida's sixty-seven counties, particularly in light of the United States Supreme Court decision in Bush v. Gore, No. SC00-949, 2000 WL 1811418 (U.S. Dec. 12, 2000). Just as the lessons learned from the last major presidential election dispute--the election of 1876--prompted substantial reform, so my vision is that the valuable lessons we have learned from the 2000 presidential election will strengthen and reinvigorate our democracy.¹⁴

Whatever the reason, we now know that not every vote intended to be cast for a candidate in this November 7, 2000, presidential election in Florida was tabulated and counted as a vote. Further, although manual recounts were completed in several counties,¹⁵ in other counties the ballots for which the

¹⁴In modern times, we have never experienced a post-election court dispute in the election for the President of the United States. The time limits Congress enacted for resolving contests in Presidential elections were established in a far different time, when our country looked far different--and was far less populous than today. Indeed, Congress enacted the safe harbor provision, 3 U.S.C. section 5, and other election-related dates, in 1887, as a result of the Hayes-Tilden post-election dispute. See Bush v. Gore, No. 00-949, 2000 WL 1811418, at *30 (U.S. Dec. 12, 2000) (Breyer, J., dissenting). The significance of these time limits is not entirely clear. See id. at *24 (Ginsburg, J., dissenting) (explaining that "the December 12 'deadline' for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. . . . [N]one of these dates has ultimate significance in light of Congress' detailed provisions for determining on 'the sixth day of January,' the validity of electoral votes. § 15"). Accordingly, although we have become a society accustomed to immediate results--communications delivered via fax with rapid speed and news stories broadcast over the Internet as they occur-- perhaps the time has come for Congress to explore whether, in the rare case of a post-election presidential controversy, a thirty-five day time limit for a final resolution of a presidential contest is realistic or reasonable.

¹⁵Full hand counts were done at the request of the Florida Democratic Executive Committee ("Committee") in Volusia, Broward, and Palm Beach Counties. See Palm Beach County Canvassing Board v. Harris, Nos. SC00-2346, SC00-2348, SC00-2349, 2000 WL 1804707, *4 (Fla. Dec. 11, 2000).

machine did not register a vote--the "undervotes"--were never examined manually to ensure that all legal votes were counted. What should concern all of us is not whether the uncounted votes were for President-Elect Bush or for Vice President Gore, but that thousands of voters in Florida did not have their vote included in this State's presidential election.

It is essential to our great democracy that all citizens have confidence in the integrity and reliability of the electoral process. As the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts expressly declared:

Recounts are an integral part of the election process. For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted. The moment an individual's vote becomes subject to error in the vote tabulation process, the easier it is for that vote to be diluted.

Id. at 15 (emphasis supplied) (footnotes omitted). As we have stated most forcefully, this Court remains committed to the principle that:

the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means

participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Boardman v. Esteva, 323 So.2d 259, 262-63 (Fla. 1975) (emphasis supplied).¹⁶

With these principles in mind, I turn to a review of some of the provisions of the Election Code and the voting systems in place at the time of the November 7, 2000, presidential election.

Statewide manual recounts: According to the official figures reported on

¹⁶ John Greenleaf Whittier's nineteenth century poem, "The Poor Voter on Election Day," more eloquently echoes the importance of this fundamental right to vote as the great equalizer between all citizens:

To-day, of all the weary year,
A king of men am I.
To-day, alike are great and small,
The nameless and the known;
My palace is the people's hall,
The ballot-box my throne!
The rich is level with the poor,
The weak is strong to-day;
And sleekest broadcloth counts no more
Than homespun frock of gray.
To-day let pomp and vain pretence
My stubborn right abide;
I set a plain man's common sense
Against the pedant's pride.
The wide world has not wealth to buy
The power in my right hand!

November 8, 2000, the day after the election, out of almost six million votes cast in Florida, the difference between the vote totals for the two candidates was a margin of only 1784 votes--0.0299% of the total Florida vote. See Siegel v. Lepore, No. 00-15981, 2000 WL 1781946, *1 (11th Cir. Dec. 6, 2000). Because the margin of victory was less than "one-half of a percent . . . of the votes cast," pursuant to Florida's Election Code, an automatic machine recount was conducted in each county in this State.¹⁷ 102.141(4), Fla. Stat. (2000). However, the Florida Election Code did not provide for an automatic procedure to allow for the option of one candidate to request a statewide manual recount according to uniform, "objective" standards.¹⁸ Thus, one of the issues that should be considered in any future study of Florida's Election Code is whether such a procedure should have been in place.

¹⁷ Although there were assertions made that the votes were counted and recounted, apparently in some counties the votes were not even subjected to a second machine count--only the machines were checked. See Phil Long & Dan deVise, Not All Florida Counties Obeyed Order To Do Recount, Miami Herald, December 15, 2000. Further, the automatic machine recount in Nassau County actually showed fewer overall votes than the initial machine count. See Gore, 2000 WL 1800752, at *2. The fact that the two machine counties showed differing vote totals should raise concerns about the reliability of machine counts in close elections. This disparity shows yet one more reason why "our society has not yet gone so far as to place blind faith in machines." Palm Beach Canvassing Board, 2000 WL 1804707, at *9.

¹⁸ At oral argument on November 20, 2000, "we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request manual recounts in all counties. Neither candidate requested such an opportunity." Palm Beach Canvassing Bd., Nos. SC00-2346, SC00-2348, SC00-2349, 2000 WL 1804707, at *14 n.21 (Fla. Dec. 11, 2000).

Instead of a procedure for requesting a statewide manual recount, the statutes in place as of November 7, 2000, provided that a candidate had the option pursuant to section 102.166(4), Florida Statutes (2000), to request a manual recount from an individual county canvassing board. Based upon the express language in section 102.166, however, the individual county canvassing board is vested with discretion to conduct the initial manual recount of at least three precincts.¹⁹ Once the initial sampling shows an "error in the vote tabulation which could affect the outcome of the election," the county canvassing board is required to exercise one of three options, with the third option being a manual recount of all ballots. — 102.166(5)(a)-(c), Fla. Stat. (2000). In counting the ballots manually, the statute provides that if the "counting team is unable to determine a voter's intent in casting a ballot, that ballot shall be presented to the county canvassing board for it to determine the voter's intent." — 102.166(7)(b), Fla. Stat. (2000).

Although in a local or countywide election the discretion of whether to conduct a manual recount may be properly vested in an individual canvassing board, the discretionary nature of the decision raises concerns of uniformity and completeness in a statewide election. In a case where a manual recount is sought

¹⁹The current statute does not set forth any criteria to guide the determination of when the decision to conduct a preliminary manual recount is appropriate. See —102.166(4)(c), Fla. Stat. (2000) ("The county canvassing board may authorize a manual recount.").

in several counties based on the identical assertion, as occurred in this presidential election, there are additional constitutional concerns raised if a manual recount is conducted and completed in some but not all the counties where the recount is requested.²⁰

This concern is demonstrated dramatically in this past election. On November 9, 2000, Vice President Gore requested manual recounts in four counties--Miami-Dade, Broward, Palm Beach and Volusia. See Gore v. Harris, 25

²⁰If manual recounts are requested by a candidate in several counties, and one board conducts a full manual recount and another board does not, then, as the Attorney General noted in his November 14, 2000, opinion letter to the Honorable Charles E. Burton, Chair, Palm Beach County Canvassing Board, an unconstitutional two-tiered system may have been created:

If hand recounts have already occurred in Seminole County and an unknown number of other counties . . . while similar hand counts are blocked in other counties . . . a two-tier system for reporting votes results.

A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual recount was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.

As the State's chief legal officer, I feel a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official canvassing boards, the state will incur a legal jeopardy, under both the U.S. and State constitutions. This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a President.

(Emphasis supplied.) It should be noted that the Attorney General's opinion did not address constitutional concerns of manual recounts not being conducted in all counties, but rather specifically addressed constitutional implications if one county canvassing board refused to conduct a manual recount requested by a candidate while other county canvassing boards agreed to conduct a manual recount.

Fla. L. Weekly S1112, n.16 (Fla. Dec. 8, 2000), rev'd and remanded, Bush v. Gore, No. 00-949, 2000 WL 1811418 (U.S. Dec. 12, 2000). The reasons for this request included the extraordinary closeness of the statewide margin, as well as concern as to whether the vote totals reliably reflected the true will of the Florida voters. Of the four counties in which Vice President Gore requested a full manual recount, only the Miami-Dade Canvassing Board did not complete a manual recount. The Miami-Dade Board's failure to complete the recount was attributed to a variety of factors but in the end the Board suspended the full recount, stating as its reason that it determined that it could not meet this Court's certification deadline. See Gore v. Harris, 25 Fla. L. Weekly S1112, n.17; see also Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board, No. 3D00-3318, 2000 WL 1790424 (Fla. 3d DCA Nov. 22, 2000).²¹ This Court ultimately held that the Miami-Dade Canvassing Board had no discretion to stop its full manual recount once it had started. See Gore v. Harris, 25 Fla. L. Weekly at S1116. Nonetheless, the end result was that some voters in Miami-Dade County whose votes were not recorded by machine never had their votes counted in this

²¹Miami-Dade did not commence the full manual recount until days after Broward and Palm Beach Counties commenced their manual recounts. In fact, the Miami-Dade Canvassing Board had initially decided not to conduct a full manual recount after receiving the results obtained from the sample recount of three precincts. See Gore, 2000 WL 1800752, at *11.

election.²² It would thus seem appropriate that any revised statutory scheme should include more specific standards to govern the exercise of county canvassing boards' discretionary authority in a statewide election.

Further, questions have been raised about the unequal treatment of voters in counties where recounts were not requested. Because section 102.166(4) provides that only a political party or a candidate may request a manual recount under section 102.166(4), there are additional issues regarding the potential for unequal treatment of voters in those counties in which a manual recount is neither requested by the candidate nor conducted by the canvassing board. Because of our concerns that if some of the undervotes were to be counted in an election contest, all of the undervotes should be counted, we held in Gore v. Harris, 25 Fla. L. Weekly at S1117, that in fashioning relief under section 102.168(8), a manual recount should be conducted in all Florida counties where there was an undervote

²²When the Miami-Dade Canvassing Board stopped the recount, approximately 20% of the votes had been manually recounted countywide, resulting in 168 net votes for Gore. However, at least 9000 undervotes were never counted. See Gore v. Harris, 25 Fla. L. Weekly at S1116. Further, Palm Beach County did not finish its recount until after 5 p.m. on November 26, 2000, and the Secretary did not include the amended results in the statewide certification. See id. at S1117. There have been those that have argued that any manual recount under the Election Code must be completed within seven days of the election. However, as we have seen, that is simply not a realistic time period and operates to the detriment of voters in the more populous counties. This problem, in itself, could raise implications of disparate treatment based solely on the voter's county of residence.

and where no manual recount had been conducted.²³ Our paramount interest was that the "election should be determined by a careful examination of the votes of Florida's citizens" so that the "outcome of elections be determined by the will of the voters," which "forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court in resolving elections disputes." Id. at S1114. Thus, any comprehensive review of the Election Code should address both the scope of the manual recount statute, section 102.166, to allow for statewide manual recounts, and the scope of the contest statute, section 102.168, to fashion appropriate relief on a statewide basis.

In addition, the United States Supreme Court's decision in Bush v. Gore has also called into question the constitutionality of any statutory scheme that does not have more specific standards for evaluating votes when conducting manual recounts than the one currently codified by Florida law, which is whether the intent of the voter can be ascertained.²⁴ Bush v. Gore, 2000 WL 1811418 at *4-6. However, before the 2000 presidential election, neither the Legislature nor the

²³I remain confident that if the recount had continued in a timely manner, any obvious disparity in counting votes would have been reviewed by Judge Terry Lewis whose initial order on December 8, 2000, demonstrated an orderly and objective approach to the recount procedures.

²⁴See Bush, 2000 WL 1811418, at *15, n.2 (Stevens, J. dissenting), in which Justice Stevens noted that the "Florida statutory standard is consistent with the practice of the majority of States, which apply either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts. Id.

Secretary of State had prescribed more explicit criteria to govern the determination of the voter's intent.²⁵ Although each county canvassing board may be properly vested with discretion to make this determination for a countywide race, the potential for differing substandards utilized by boards in different counties raises questions of unequal treatment among similarly situated voters in statewide races.²⁶ See id. at *4-5. This in turn requires an evaluation of whether there is a need for more specific standards, particularly in statewide elections, to be in place to ensure uniformity in the assessment of votes and in the determination of voters' intent when dealing with similar voting systems.²⁷

²⁵Neither candidate raised the constitutionality of Florida's election laws as an issue on appeal to this Court. See Palm Beach County Canvassing Board v. Harris, 2000 WL 1804707 *n.7 (Fla. December 11, 2000). Instead, President-Elect Bush chose to bring a separate challenge to the constitutionality of section 102.166 in federal court. See Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla.) (denying a request for a preliminary injunction to stop the recount), aff'd, No. 00-15981, 2000 WL 1781946 (11th Cir. Dec. 6, 2000).

²⁶For example, although much of the focus has been on the potential disparity in counting votes in punchcard counties, it appears the potential for disparity could exist in counties utilizing optical scanning machines when one county adopts a per se rule and another employs a totality of the circumstances approach to evaluate voter intent. See Jeff Kunerth, Scott Maxwell & Maya Bell, Voter Never Had Chance, Orlando Sentinel, December 17, 2000 (explaining that in Lake County, the canvassing board decided against counting votes of residents who filled in the circle next to a candidate's name but who also wrote in the same name on the ballot; whereas in Orange County, canvassing officials counted such votes, stating that intent was clear). If a manual recount would have been undertaken in any county using a per se rule, there could be a real potential that legal votes would not have been counted. This potential demonstrates the pitfalls of any per se rule, even while this past election raised concerns about the application of a totality of the circumstances approach to determine voters' intent when employed on a county-to-county basis.

²⁷The statutory scheme that stresses local autonomy results from the present administration of all elections in Florida, which includes statewide and local controls. Although the Secretary of

The Failure to Count Undervotes: Throughout this litigation, both the Secretary of State and President-Elect Bush asserted that the manual recount statute, section 102.166, was never intended to apply to allow for the counting of undervotes.²⁸ Florida's Election Code currently provides for a manual recount where there is an "error in the vote tabulation which could affect the outcome of the election." § 102.166(5). Utilizing traditional methods of statutory construction, we concluded in our decision in Palm Beach County Canvassing Board v. Harris, 2000 WL 1804707, at *7, that "an error in vote tabulation" triggering a manual recount included the failure of a properly functioning machine to discern the choices of the voters as revealed by the ballots.

Further, in Gore v. Harris, we construed the term "legal vote" as used in the contest statute, section 102.168(3)(c), to be one where an examination of the ballot reveals a "clear indication of the intent of the voter." Gore v. Harris, 25 Fla. L. Weekly at S1116. In defining "legal vote," we looked to the Florida Election

State is the chief election officer of the state, see section 97.102(1), Florida Statutes (2000), the actual conduct of elections occurs in Florida counties with the county canvassing boards in each county responsible for counting the votes given each county. See § 102.131(1), § 102.141(2), Fla. Stat. (2000).

²⁸Initially, their position in this Court had been that any attack on the problems with punchcard ballots and the increased percentage of undervotes should not be raised under the protest provisions of section 102.166(4), but in the contest provisions of section 102.168. But see Gore v. Harris, 25 Fla. L. Weekly at S1113 n.7 (noting parties' change of position that section 102.168 does not apply to a presidential election).

Code and once again applied traditional methods of statutory construction as amplified by our prior case law.²⁹ We found that both the statutes and this Court's jurisprudence have consistently paid homage to the principle that "every citizen's vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States." Id.

The position, however, has been espoused--most specifically by the Secretary of State in an advisory opinion issued after the November 7, 2000, election--that the manual recount statute does not provide for the counting of undervotes.³⁰ Further, the Secretary of State has taken the position that a "legal vote" is only one where the vote is "properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places." Bush v. Gore, 2000 WL 1811418, at *18 (Stevens, J., dissenting) (citing Brief of Respondent Harris et al. at p. 10).

In other words, according to the positions taken by the Secretary of State in this litigation, if a voter does not completely dislodge the chad or mark the optical scan card in strict accordance with the instructions, resulting in the machine not registering a vote, that vote should not constitute a "legal vote." Under the

²⁹See, e.g., State ex rel. Carpenter v. Barber, 144 Fla. 159, 163-64, 198 So. 49, 50-51 (1940); Wiggins v. State ex rel. Drane, 106 Fla. 793, 795-97, 144 So. 62, 63 (1932).

³⁰See Division of Elections Advisory Opinion, DE 00-13, November 13, 2000.

Secretary's interpretation of the manual recount statute and narrow definition of "legal vote," there would never be an opportunity to resort to a manual method of counting the undervotes under either the protest or contest provisions of Florida's Election Code. The implication of these dual positions would be that voters who cast votes that were incapable of being read by the machine would not be counted through a manual recount either pursuant to section 102.166 or section 102.168-- even if upon a manual review the voter's intent was clearly ascertainable.³¹ In short, these votes would not be counted at all.

There are obviously important implications that flow from the Secretary of State's position that will affect elections long after this one. The Department of State is charged, among other responsibilities, with adopting rules to

³¹In fact, the Texas statute, as well as the statutes in many other states, clearly anticipates that in a manual recount all punchcard ballots would be reviewed even where the chad is not completely detached, with the overarching concern being the "clearly ascertainable intent of the voter." The Texas statute provides in pertinent part:

(d) Subject to Subsection (e), in any manual count conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless:

- (1) at least two corners of the chad are detached;
- (2) light is visible through the hole;
- (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote; or
- (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote.

(e) Subsection (d) does not supersede any clearly ascertainable intent of the voter.

Tex. Elec. Code Ann. § 127.130 (Vernon Supp. 2001).

achieve and maintain the maximum degree of correctness, impartiality, and efficiency of the procedures of voting, including write-in voting, and of counting, tabulating, and recording votes by voting systems used in this state.³²

However, before the November 7, 2000, election, this State had a patchwork of different voting systems and ballots selected on a countywide basis and necessarily approved by the Secretary of State. If the Secretary's restrictive view of "legal votes" and manual recounts is ultimately adopted through amendments to the Election Code, there are potential constitutional implications, especially if the different voting systems continue to remain in operation. Simply put, the failure to allow for a manual recount would have a disparate effect on those counties that employed punchcard systems.³³

³²Further, pursuant to section 101.015(2), "each odd-numbered year the Department of State shall review the rules governing standards and certification of voting systems to determine the adequacy and effectiveness of such rules in assuring that elections are fair and impartial."

³³As Justice Stevens points out, carried to its logical conclusion "Florida's decision to leave to each county the determination of what balloting system to employ--despite enormous differences in accuracy--might run afoul of equal protection." Bush, 2000 WL 1811418, at *15 (Stevens, J., dissenting) (emphasis supplied). Justice Stevens notes that "[t]he percentage of nonvotes in counties using a punch-card system was 3.92%; in contrast, the rate of error under the more modern optical-scan system was only 1.43%. Put in other terms, for every 10,000 votes cast, punch-card systems result in 250 more nonvotes than optical-scan systems." Id. at *14, n.4 (citations omitted). In fact, in the 1996 presidential election, in Brevard County and Volusia County, votes tallied on punch cards showed twenty-six of every 1000 voters failed to cast a valid presidential vote. In 2000, after both counties switched to optical scanning, the proportion fell to fewer than two of every 1000 presidential votes in Brevard County and three of every 1000 in Volusia County. See Peter Whoriskey & Joseph Tanfani, Punch Card Problems Were Ignored for Years, Miami Herald, December 17, 2000.

As noted by the trial court in this case, Miami-Dade and Palm Beach Counties have been "aware . . . for many years" of the problems with "voter error, and/or, less than total accuracy, in regard to the punchcard voting devices utilized. Gore v. Harris, 25 Fla. L. Weekly at S1116. As the United States Supreme Court noted in Gore v. Bush, 2000 WL 1811418, at *3, "[t]his case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter."

For a variety of reasons ranging from the voter's failure to precisely follow directions to difficulties with the machine itself, punchcard systems have a higher percentage of ballots that the machine does not register as a vote as compared to the optical scanner system. Therefore, if the safeguard of a manual recount is not available to protect the integrity and reliability of the electoral process or if a "legal vote" is narrowly defined, voters in punchcard counties would be treated unequally as compared to voters in counties that utilize more reliable voting machinery, such as optical scanning technology.³⁴ Until there is modernization

³⁴As reported, prior studies have shown various problems with the punchcard system and the fact that it has a higher failure rate than more modern systems. In fact, a 1988 National Bureau of Standards report recommended their elimination. See Peter Whoriskey & Joseph Tanfani, Punch Card Problems Were Ignored for Years, Miami Herald, December 17, 2000; Brooks Jackson, Punch-Card Ballots Notorious for Inaccuracies, <http://www.cnn.com/2000/ALLPOLITICS/stories/1115/jackson.punchcards/index.html>; see also Rafeal Lorente, '96 Analysis: Minority Votes for President More Likely to Go Uncounted, Sun Sentinel, December 7, 2000 (explaining that in 1996, twenty-six out of every 1000 votes cast using the punchcard system were disqualified, versus only seventeen

and uniformity of voting systems that will minimize the likelihood of a vote not being recorded and until punchcard systems are retired from use, statewide disparity in voting systems could operate to disenfranchise a number of otherwise eligible voters based upon their county of residency.³⁵ This disparity, based only on one's county of residence, might have constitutional implications.³⁶

Conclusion: The realities of this past election have indeed "demonstrated the vulnerability of what we believe to be a bedrock principle of democracy: that every vote counts." Gore v. Harris, Fla. L. Weekly at S1117 n.20. I thus applaud Governor Jeb Bush's creation of a Task Force that will study the state's elections process and recommend improvements to "ensure the fairness of our system" and

of every 1000 votes using the optical scanning system); Scott Maxwell, Palm Beach Has Had Trouble Before, Orlando Sentinel, December 5, 2000 (explaining that Palm Beach County's elections supervisor reported in 1996 that faulty voting machines led to an unusually high number of ballots for which there was no vote for President).

³⁵It does appear that a significant part of the problems have resulted from the outmoded voting systems in place in many counties in this State and nationwide. This is in contrast with what appears to be the use in other countries of more modern, uniform and efficient methods of making sure that every vote is counted. See Mary McGrory, Just Fine Without a Chad, Washington Post, December 10, 2000, at B1 (describing the voting systems in Mexico, Canada and India); Stephen Buckley, Brazilians' Pride Grows in Electronic Voting System, Washington Post, December 2, 2000, at A18 (explaining Brazil's electronic voting system, which includes the use of a machine that looks like a miniature ATM).

³⁶See Moore v. Ogilvie, 394 U.S. 814(1969) (invalidating a county-based procedure that diluted the influence of citizens in larger counties in the nominating process).

to fully modernize our voting and counting mechanisms.³⁷ As we enter the twenty-first century, we must strive to ensure that our Election Code and system of voting operates so that in all future elections, each eligible voter both has the opportunity to cast a vote and that every vote intended to be cast for a candidate will be counted.³⁸

Appeal of Judgment of Circuit Court, in and for Leon County, N. Sanders Sauls, Judge, Case No. CV 00-2808 - Certified by the District Court of Appeal, First District, Case No. 1D00-4745

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³⁷See Jeb Bush Appoints Task Force to Recommend Improvements in the Way Florida Votes, CNN.com (Dec. 14, 2000), <http://www.cnn.com/2000/ALLPOLITICS/stories/12/14/fla.elections/>. As Governor Jeb Bush recently stated: "Real electoral reform is not only updating our technology and clarifying our standards. It also means reaffirming our commitment to making sure every citizen has faith and confidence in our electoral system -- even when the margin of victory in a race is very close." Mary Ellen Klas, Panel to Ensure Vote Debacle Won't Recur, The Palm Beach Post (Dec. 15, 2000), http://www.gopbi.com/partners/pbpost/epaper/editions/today/news_3.html.

³⁸Although much of the discussion herein has been focused upon problems with the present election code and the actual voting systems, it is clear that the subject of election and voting reform will be far broader. Issues ranging from the difficulty with the actual form of the ballot in certain counties to concerns with the practices surrounding the casting of absentee ballots, and even concerns over whether voters were denied access to the polls, have opened our collective eyes to see that meaningful and comprehensive reform in many areas may be required.

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William Kemper Jennings, DeFuniak Springs, Florida,

for Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith
Temple, and Mark A. Thomas, Intervenor